DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 18

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1975

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FEDERAL MARITIME COMMISSION

DOCKET NO. 71-93

VIKING IMPORTRADE INC.
AND BERNARD LANG & CO., INC.
POSSIBLE VIOLATIONS OF SECTION 16,
FIRST PARAGRAPH, SHIPPING ACT, 1916

ADOPTION OF INITIAL DECISION

August 12 1974

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Ashbrook P. Bryant, served December 13, 1973, in which he concluded that the record would not sustain a finding that either Bernard Lang & Co., Inc. (Lang), a licensed ocean freight forwarder acting solely in its role as a customhouse broker, or Viking Importrade, Inc. (Viking), a consignee of the shipments at issue, had violated section 16 First of the Shipping Act, 1916, by obtaining or attempting to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Hearing Counsel excepted to the Initial Decision, while Lang and Viking supported the Judge's position.

Hearing Counsel's exceptions generally fall into two categories. They are either (1) a recapitulation of arguments which we have addressed ourselves to and answered in *Ross Products, A Division of NMS Industries, Inc. and Taub, Hummel & Schnall, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916,* 16 F.M.C. 333 (1973), and *Equality Plastics, Inc. and Leading Forwarders, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916,* Docket No. 71-94, served November 29, 1973, *Denial of Petition of Reconsideration,* served May 16, 1974, and/or (2) a reargument of contentions already advanced before the Administrative Law Judge and properly rejected by him in his Initial Decision. Therefore, upon a careful review and consideration of the record in this proceeding, as well as the exceptions and replies of counsel, we conclude that the Administrative Law Judge's findings and conclusions with respect

thereto are proper and well founded and we accordingly adopt his Initial Decision as our own.

Therefore, it is ordered, That this proceeding be discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 71–93

VIKING IMPORTRADE INC.
AND BERNARD LANG & CO., INC.
POSSIBLE VIOLATIONS OF SECTION 16,
FIRST PARAGRAPH, SHIPPING ACT, 1916

Evidence insufficient to show knowing and wilful violation of section 16 First of the Shipping Act, 1916, by respondent Viking Importrade, Inc., in connection with misdescriptions of various commodities on bills of lading and obtaining transportation by water of some of those commodities at rates lower than rates otherwise applicable.

Evidence found insufficient to establish that Bernard Lang & Co., Inc., violated section 16 First of the Shipping Act, 1916, and thus continues to qualify to be licensed as a freight forwarder.

Lawrence I. Drath for respondent Viking Importrade, Inc.
Bernard Lang for respondent Bernard Lang & Co., Inc.
Donald J. Brunner and *Joseph B. Slunt* as Hearing Counsel.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

1. Pursuant to section 22 of the Shipping Act, 1916 (the Act), the Commission on December 1, 1971, instituted this proceeding by issuance of an order directing that a proceeding be instituted to determine whether respondent Viking Importrade, Inc. (Viking), and/or respondent Bernard Lang & Co., Inc. (Lang), violated section 16 of the Act by knowingly and willfully, directly or indirectly, by means of false classification, or by any other unjust or unfair device or means obtained or attempted to obtain transportation by water of property at less than the rates or charges which would otherwise be applicable. The Commission's order further provided that a determination be made whether because of alleged activities of respondent Bernard Lang & Co., Inc., said respondent continues to qualify to be licensed as an ocean freight forwarder or whether its license should be revoked

[1] This decision became the decision of the Commission 8/12/74.

or suspended pursuant to section 44 of the Act and sections 510.9(a) of the Commission's Rules of Practice and Procedure, 46 CFR #510.9. It was alleged in the Commission's order that certain shipments consigned to Viking during the period from August 2, 1969, through December 29, 1969, appeared to have been misclassified resulting in the assessment of incorrect ocean freight charges.

2. Hearing was held at New York, N.Y., on May 9, 1973.

3. The bills of lading involved described the seven shipments as toys or novelties, whereas the customs papers, shippers invoices, and packing lists and inspections disclosed that the shipments were composed of commodities other than toys or novelties which in most cases were subject to higher freight rates. The evidence adduced through stipulation of the parties and from four witnesses and a number of papers and documents establishes the following with regard to the seven shipments here involved. The shipments in question were as follows:

4. Sea-Land Service, Inc. (Sea-Land), Bill of Lading No. 905–438097 covered the shipment of 311 cartons listed on the bill of lading as "Toy" from Kobe, Japan, to Elizabeth, New Jersey. This cargo was being shipped by the Oriental Merchandising Agency, Osaka, Japan (Oriental), to Viking Importrade, Inc., Moonachie, New Jersey. Bernard Lang & Co., Inc., acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with the Bureau of Customs described the cargo as: other illuminating articles non-electric, wax candles, notebooks, pencils, articles nspf of brass, rubberized linen cloth shopping bags, handbags of veg. fiber, articles of base metal, and bamboo baskets.

5. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys. As a result of an inspection of the cargo by Sea-Land, Viking was billed for additional freight charges in the amount of $72.85 based on a determination by Sea-Land that the cargo should have moved at different rates. Viking by letter of December 5, 1969, challenged the freight classifications Sea-Land applied to three of the items shipped, namely that the northlite candle lamps should have moved as Lamps & Lanterns—Value under $200 per revenue ton at 38.75 per weight or measurement ton (W/M) instead of as Lamps & Lanterns—Unitized at 43.25 S/M; the jockey shoehorns should have moved as Iron & Steel Manufactures, NOS at 46.25 W/M instead of as Instruments at 54.00 W/M; and the garden tool sets should have moved as Tools, Hand, NOS-Value under $400 per revenue ton at 36.00 W/M instead of as Tools, Hand, NOS-Value over $400 per revenue ton at 46.25 W/M. Viking thus calculated the additional freight

due as $21.29, but as Sea-Land never confirmed this amount Viking did not make any additional payment to Sea-Land.

6. Sea-Land Bill of Lading No. 905–438502 covered the shipment of 275 cartons listed on the bill of lading as "Toy" from Kobe, Japan, to Elizabeth, New Jersey. This cargo was being shipped by Oriental to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with the Bureau of Customs described the cargo as: bamboo fruit baskets, table knives, address books, postcard stands, boxes of papers, pencils, garden tool sets, articles for serving food, canvas saddle bags, and kerosene lamps.

7. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys. As a result of a review of the shipment, Viking was billed by Sea-Land for additional freight charges in the amount of $46.35 based on a determination by Sea-Land that the cargo should have moved at different freight rates. The additional freight charges were paid by Viking.

8. Sea-Land Bill of Lading No. 937–411723 covered the shipment of 270 cartons listed on the bill of lading as "General Merchandise of Japanese Origin (Novelties & Toys)" from Yokohama, Japan, to Elizabeth, New Jersey. This cargo was being shipped by Silva Wilson & Co. Ltd., Tokyo, Japan, to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with the Bureau of Customs described the cargo as: metal ash trays, toothpick holders, trick brandy glasses, candle holders, and salt/pepper sets.

9. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys. As a result of an inspection of the cargo by Sea-Land, Viking was billed for additional freight charges in the amount of $62.95 based on a determination by Sea-Land that the cargo should have moved at higher freight rates. Viking by letter of February 17, 1970, challenged the freight classification Sea-Land applied to one of the items shipped, namely that the trick brandy glasses should have moved as Novelties at 36.00 W/M instead of as glass manufacturers NOS, value under $500 per revenue ton at 41.50 W/M. Viking thus calculated the additional freight due as $48.82 and upon receipt of a corrected freight bill paid this sum to Sea-Land.

10. Sea-Land Bill of Lading No. 905–401438 covered the shipment of 207 cartons listed on the bill of lading as "toy" from Kobe, Japan,

to Elizabeth, New Jersey. This cargo was being shipped by Oriental to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with Bureau of Customs described the cargo as shopping bags of other materials, wooden household articles, baskets of bamboo, articles of iron or steel, and promenade bags.

11. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys. As a result of an inspection of the cargo by Sea-Land, Viking was billed for additional freight charges in the amount of $49.46. The additional freight charges were paid by Viking.

12. Sea-Land Bill of Lading No. 905–404202 covered the shipment of 104 cartons listed on the bill of lading as "Toy" from Kobe, Japan, to Elizabeth, New Jersey. This cargo was being shipped by Oriental to Viking, and Lang also acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with the Bureau of Customs described the cargo as bamboo baskets, articles of steel, household implements of iron or steel and cotton netting.

13. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys.

14. Sea-Land Bill of Lading 905–410092 covered the shipment of 1228 cartons listed on the bill of lading as "Novelties, Toys, Earthenware, Stoneware, Ironstone Ware, Bone China and Procelain Ware" from Nagoya, Japan, to Elizabeth, New Jersey. This cargo was being shipped by the Mogi Trading Co., Ltd., Nagoya, Japan, to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry described the cargo as articles of aluminum, articles of base metal, chrome plated ware, wooden household articles, table knives, cotton furnishings, table forks, plates, earthenware, and bone china ware, mugs, procelain ware, and sanitary ware.

15. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rates for a shipment of novelties, toys, stoneware, ironstone ware, bone china, procelain and earthenware.

16. Sea-Land Bill of Lading No. 937–414890 covered the shipment of 534 cartons listed on the bill of lading as "Wood Novelty" from Shimizu, Japan, to Elizabeth, New Jersey. The cargo was being

shipped by Kurito Bros. & Co., Ltd., Shizuoka, Japan, to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry described the cargo as wooden household articles, glass containers, household articles of plastic, articles nspf of wood, picture frames of wood, and hand tools.

17. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of novelties.

18. The bills of lading for the above shipments were not prepared by Viking or Lang but by the shipper or its agent in Japan. Each bill made reference to an attached sheet of marks and numbers which consisted of a description of the items being shipped together with the number of cartons shipped.

19. Lang is an ocean freight forwarder licensed under the Act.

20. Lang is also a customs broker subject to the jurisdiction of the Bureau of Customs. It handles approximately 8,000 customs entries per year. Viking accounts for approximately 400 such entries. Viking is a very active importer covering a wide variety of items. Bernard Lang has been in "ownership-management of various custom brokerage firms since 1951." Lang was incorporated in July 1960.

21. In the case of import shipments—as contrasted with export shipments which are handled by Lang as a licensed freight forwarder —the importer (Viking in this case) sends Lang "the Documents" (including the bill or bills of lading) and the commercial invoice or invoices. Bernard Lang described the process on import shipments:

> . . . Viking sends me the documents for incoming shipments. Until I receive these documents I have no knowledge that anything exists. I don't know goods that have been ordered (sic). I don't know that they have been shipped. I don't know that freight has been gauged, how it has been described. At no point prior to my receiving documents from Viking am I involved in obtaining transportation by order in their behalf or anybody's behalf.
>
> The seven shipments from Viking were all handled in the same manner. Documents came down to us. Viking indicated on the document what they believed, based upon their knowledge of the commodity, should be the applicable rate of (customs) duty. These are reviewed by my office, changes that ought to be made are discussed with Viking. The duty is calculated the papers are presented to the United States Customs, together with the bill of lading as received from abroad, and the customs entry which I prepared in my office, my office prepared.

22. After the correct duty had been paid, Customs issued a permit and Lang sent it to the pier and a delivery order for the commodities was given to Viking. In each of the shipments Lang paid the ocean freight charges in behalf of Viking based on the "freight being charged" as indicated on the bill of lading. Lang made no effort to

determine whether the "correct ocean freight rate was being charged" and paid. Bernard Lang testified that his firm which acts as ocean freight forwarder on export shipments is familiar with freight rates from United States to Japan but would not have familiarity with inbound freight rates from Japan to the United States which may be quite different from the outbound rates.

23. Bernard Lang differentiates sharply between his status and responsibility as a customs broker and his duties and responsibilities as freight forwarder under the Act. He testified to his understanding of the dual relationship:

> . . . I am a customs broker and as customs broker am subject to the customs regulations of the United States, and whenever we are faced with a situation where the customs regulations of the United States are at variance with the laws of another agency, I am bound to follow those of the customs regulations since I am licensed by the Bureau of Customs to act as a customs broker and no other agency in the United States can license me to act as a customs broker other than the Bureau of Customs.

24. Bernard Lang understands that as customs broker he was required to comply with all requirements of other government agencies that are specified in the customs regulations. However, he does not have a responsibility to verify the accuracy of classifications of commodities and freight charges appearing on bills of lading covering inbound shipments for which he acts as customs broker.

25. As above stated, Lang paid the freight on behalf of Viking in each of the seven instances of shipment involved in this matter. With regard to the procedure involved in these payments Bernard Lang testified as follows:

> Q. (By Mr. Slunt) In these specific instances, do you know whether or not Sea-Land released the cargo upon receipt of this delivery order.
>
> A. Upon receipt of this delivery order and supporting documents, yes, sir.
>
> Q. Sea-Land would have released these specific shipments when they did receive these specific shipping orders and documents.
>
> A. Not only would they, but they did.
>
> Q. What were the supporting documents that go along.
>
> A. The original bill of lading.
>
> Q. Any further documents?
>
> A. Not to Sea-Land, other than the payment of the Ocean Freight.

26. As above stated, Viking is an importer of novelties and imports approximately 400 shipments of merchandise from the Orient each year. The 400 shipments are made up of a wide variety of items of merchandise which sell at retail in a price range of one to two dollars.

27. Viking prepares "thousands" of purchase orders which are sent to the shippers of the goods. With regard to the 55 purchase orders

involved in the seven shipments Viking's employees instructed the shipper as follows:

As to 17 such purchase orders-declare and classify "novelties."
As to 17 such purchase orders-declare and classify "cheapest applicable."
As to 3 such purchase orders-declare and classify "toys."
As to 10 of such purchase orders-declare and classify "earthware."
As to 7 such purchase orders-declare and classify _____.
As to one of such purchase orders-declare and classify "stoneware."

28. Each of the seven bills of lading involved was prepared in Japan either by the shipper or Viking's buying agent. Similarly, the rating of the cargo was done in Japan by employees of Sea-Land the carrier. Each bill of lading made reference to an attached sheet which contained a description of the items being shipped.

DISCUSSION AND CONCLUSION

Lang contends that its sole responsibility with regard to the seven shipments involved was to "clear the shipment through customs in accordance with the Customs laws and regulations." Lang further asserts that it was not authorized or empowered to obtain transportation by water for the shipments herein involved, could not do so and indeed did not do so. The first knowledge Land had as to the shipments was the receipt of documents for customs clearance. The method of transportation and the carrier had previously been selected. The bills of lading had been prepared including the commodity descriptions appearing thereon and the freight rates assessed prior to Lang even being aware that these shipments existed. According to Lang, the facts prove, beyond a doubt, that Lang was in no manner involved in obtaining or attempting to obtain transportation by water for the property subject to these proceedings. Lang, therefore, could not knowingly and willfully have been a party to obtaining such transportation at less than the rates or charges which would otherwise be applicable and, hence, could not have violated section 16 of the Act and did not do so.

This jurisdictional argument and a related argument by Viking may be dealt with quickly in view of the Commission's very recent holding in *Equality Plastics, Inc, and Leading Forwarders, Inc.,* Docket No. 71–94, served November 29, 1973. The facts in that case were in many respects identical or closely similar to those here involved. There as here Leading, the customs broker/freight forwarder, had no contact with the shipment except through the "documents" in preparation of the Consumption Entry, etc., in each instance paying the freight appearing on the bills of lading (in other instances the shipments were prepared.) The Commission said (Report, p. 8):

We think it clear that the second paragraph of section 22 empowers the Commission to concern itself with all violations of the Shipping Act, 1916, we have jurisdiction to investigate violations of section 16 by persons or entities named in that section, whether or not they are "other persons subject to [the] Act."

The argument [also made by Lang in this case] that because Leading had merely performed paper work to get the shipment through customs it could not be charged with "obtaining transportation by water" within the meaning of section 16 was rejected. The Commission said (p. 13):

. . . the legislative purpose behind the 1936 Amendment (section 16 First) was to extend coverage of the Act beyond carriers and to any party who participates in the transaction. The virtually all-inclusive language of the section makes this abundantly clear; it provides:

That it shall be unlawful for any *shipper, consignor, consignee, forwarder, broker,* or *other person,* or *any officer, agent, or employee thereof,* knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water of property at less than the rates or charges which would otherwise be applicable. [Emphasis added.]

In view of this language there can no longer be doubt, if indeed any such doubt previously existed, that section 16 First was intended to and does cover transactions such as those involved in this case by any person "who participates in the transaction" and even though such participation merely has to do with necessary paper work of the kind here involved.

The proper standard to determine whether in the circumstances of this case a *party* has "knowingly and wilfully" violated section 16 is found primarily in *Misclassification of Tissue Paper as Newsprint Paper,* 4 F.M.B. 483, 486 (1954), wherein it was stated:

[T]he phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act.

In *Equality Plastics* the Commission elaborated (p. 14):

We think the term "plainly indifferent," as used by our predecessors in *Misclassification of Tissue Paper, supra,* means something more than casual indifference, and equates with a wanton disregard from which an inference can be drawn that the conduct was in fact purposeful; a standard somewhat analogous to the tort concept of "gross negligence."

The key is whether respondents were "in possession of sufficient facts to raise a doubt as to the accuracy of the bills of lading descriptions." *Equality Plastics and Leading Forwarders, supra.*

Under the test laid down by the Commission in its most recent pronouncement on the subject it does not appear that Lang can be found to have violated section 16 of the Act in the transactions here involved. Lang can only be charged with failure to make diligent inquiry into the correctness of the freight rates which it says it had no reason to make and indeed could not properly make under the regulations of the Customs Bureau. However that may be, the evidence in any event falls short of establishing gross negligence on Lang's part.

Taking into account the instructions given by Viking to its agent in Japan and the circumstances surrounding these shipments, it appears possible that Viking could reasonably have supposed that the "marks and numbers" placed on the bills of lading and attachments thereto were a sufficient augmentation of the descriptions "Toy," "Novelties," etc., as to have informed the carrier, Sea-Land, of the actual nature of the specific commodities, and that, as a result, the commodities had been rated and the freight gauged accordingly. Also, the many different inexpensive novelty items imported by Viking and the wide variety of possible descriptions involved make some latitude of description by general class convenient and, perhaps, justifiable on the face of the bill of lading.

It may be readily conceded that Viking's handling of these shipments was somewhat lax, casual and negligent. However, if we are to apply the same standard of accountability to Viking as we do to Lang —and it seems equitable that we should—in all the circumstances of this case [including the fact that some of the misclassifications carried a higher rate to be charged and paid than a more accurate classification would have required], it appears that inadvertent error, loose procedures and other types of ordinary negligence—as opposed to gross negligence—may account for the classification "errors" involved. This may be particularly true as it has not been shown that such misclassification was "persistent" or was involved in more than a minimal number of the large amount of commodity shipments handled by Viking. Nor does payment by Viking of a small amount of additional freight with regard to three of the seven misclassified shipments alter the result. There is no dispute that some of the items involved were misclassified. In some instances the freight charged for a particular item was too high, in some too low. The fact that when the deficiencies were brought to its attention Viking paid additional freight in those cases where it acknowledged that additional freight was due does not establish that it wilfully and knowingly violated the Act.

Accordingly it is found that the record does not establish the degree of negligence and culpability on the part of either respondent to

establish violation of section 16 First of the Act. Respondent Lang continues to qualify to be licensed as a freight forwarder pursuant to section 44 of the Act.

The proceeding should be discontinued.

(S) ASHBROOK P. BRYANT,
Administrative Law Judge.

WASHINGTON, D.C.,
December 13, 1973.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-24

AGREEMENT NO. T-2635-2 PACIFIC MARITIME ASSOCIATION FINAL PAY GUARANTEE PLAN

ADOPTION OF INITIAL DECISION

August 12 1974

This proceeding is before us on exceptions filed by Wolfsburger Transport-Gesellschaft m.b.H. to the Initial Decision of Administrative Law Judge Ashbrook P. Bryant, served February 6, 1974, in which he found that:

> Agreement No. T-2635-2 does not give any undue or unreasonable preference or advantage to any other cargo over automobiles in violation of section 16 of the Act nor is the assessment being charged automobiles an unreasonable practice related to receiving, handling, storing or delivering property in violation of section 17 of the Act.
>
> Agreement No. T-2635-2 is not unjustly discriminatory or unfair as regards the carriage of automobiles and accordingly may be approved pursuant to section 15 of the said Act.

As they relate to Judge Bryant's conclusions of law, the exceptions merely constitute a reargument of contentions already advanced before the Administrative Law Judge and properly considered and disposed of by him in his Initial Decision.

Exceptions were also taken to certain findings of fact made by the Administrative Law Judge. Without addressing ourselves to the correctness of these findings we do find them to be of minimal importance to the ultimate disposition of the issues in this proceeding. Many of the discrepancies alluded to by Complainant are so small as to defy significance and others are simply not material or relevant to the ultimate conclusions reached.

Thus, upon careful consideration of the record, exceptions, briefs and argument of counsel, we find that the ultimate conclusions of the Administrative Law Judge are proper and well-founded and we accordingly adopt the Initial Decision as our own.

Therefore it is ordered, That Agreement T-2635-2 is approved pursuant to Section 15 of the Shipping Act, 1916.

It is further ordered, That this proceeding be discontinued.

By the Commission.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*Commissioner Clarence Morse not participating.

FEDERAL MARITIME COMMISSION

No. 73-24

AGREEMENT NO. T-2635-2 PACIFIC MARITIME ASSOCIATION FINAL PAY GUARANTEE PLAN

Agreement No. T-2635-2 for assessment of PMA members to fund PMA/ILWU Pay Guarantee Plan found not to subject automobiles to any undue or unreasonable disadvantage nor to involve any unreasonable practice related to receiving, handling, storing, or delivering property, in violation of sections 16 and 17 of the Act. Said agreement is found not to be unjustly unfair or discriminatory and may be approved pursuant to section 15 of the Act.

Edward D. Ransom and *Robert Fremlin* for Pacific Maritime Association and its members.

Herbert Rubin, Cecelia H. Goetz and *Alan A. D. Ambrosio* for Wolfsburger Transport-Gesellschaft m.b.h.

Donald J. Brunner, Paul J. Kaller and *David Fisher* as Hearing Counsel.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

Background

1. On May 4, 1973, the Commission by order instituted this proceeding pursuant to sections 15 and 22 of the Shipping Act, 1916 (the Act), to determine whether because of the assessment formula contained therein and its application to automobiles, Agreement No. T-2635-2 [Pacific Maritime Association (PMA) Final Pay Guarantee Plan] (the agreement), filed December 15, 1972, for approval pursuant to section 15 should be approved, disapproved, or modified. The agreement, if approved, would finalize the assessment formula used in the Interim Pay Guarantee Plan which was first approved by the Commission on May 23, 1972, and then later extended.[2] The Interim Plan has allowed

[1] This decision became the decision of the Commission 8/12/74

[2] Agreement No. T-2635 was originally due to expire on September 30, 1972. By order of the Commission served September 29, 1972, the agreement was extended until December 28, 1972; by order served December 27, 1972, the agreement was extended until June 29, 1973; by further order on May 3, 1973, it was extended to December 31, 1973, and by order of December 27, 1973, the agreement was extended until such time as the Commission approves, disapproves or modifies the agreement.

PMA to fund the substantial weekly liability owing to the Plan which relates to a collective bargaining agreement between PMA and International Longshoremens and Warehousemens Union (ILWU).

2. In its order of May 4, 1973, the Commission noted that Wolfsburger Transport-Gesellschaft m.b.h. (Wobtrans) had filed a protest against the agreement alleging *inter alia* that the assessment formula is discriminatory with respect to automobile cargoes because the liability under the Pay Guarantee Plan is contingent upon the lack of work opportunities, a problem unrelated to the carriage of automobiles and that Wobtrans denies that automobile carriage receives any benefits proportionate to the burden of assessment. Also, the Commission directed that a determination be made whether automobiles are subject to any undue or unreasonable disadvantage because of the assessment in violation of section 16 of the Act or such assessment is an unreasonable practice related to receiving, handling, storing, or delivering property in violation of section 17.

3. Early in the proceeding the question arose whether the Order of Investigation included approval, disapproval, or modification of funding of the Pay Guarantee Plan adopted by PMA and ILWU following the July 1, 1973, expiration of the ILWU/PMA agreement. The Administrative Law Judge requested the parties to submit briefs on that question. That was done and it was held that the Commission Order covered consideration of funding of the Pay Guarantee Plan as continued and amended by the Memorandum of Understanding between PMA and ILWU dated June 9, 1973, and ratified by the parties on July 16, 1973.[3]

4. The parties agreed to submit their cases in large part by a Joint Stipulation of Facts and Affidavits. In addition, the depositions of three witnesses were taken, and later received as part of the record, and one witness testified in oral hearing on November 1, 1973.

The Parties

5. PMA is a corporation composed principally of stevedore companies and steamship lines and their agents doing business on the West Coast of the United States. Its main business is to represent its members in negotiations with various maritime unions, among which is ILWU, and to establish policy for its members in matters involving labor and labor controversy. As of early 1973, 126 companies were members of PMA.

6. Wobtrans is a corporation organized and existing under the laws of the Federal Republic of Germany with its principal place of

[3]See *Procedural Ruling*, served August 2, 1973.

business in Wolfsburg, Germany. It operates vessels engaged in the transport of vehicles from Germany to the Pacific Coast ports, among other places. The cargo is largely if not exclusively Volkswagen automobiles. Wobtrans is not a member of PMA but would be eligible for membership if it became a direct employer of longshore labor. However, the stevedores handling the cargoes of Wobtrans are members of PMA and accordingly are assessed by PMA on the automobiles handled by them.

Background of the Agreement

7. PMA and ILWU have entered into a number of collective bargaining agreements going back over many years, in which fringe benefits have progressively been included.

8. In 1960, PMA and ILWU agreed upon a new fringe benefit plan, the M & M Agreement, which included early retirement, supplemental retirement and pay guarantee benefits. This agreement has been referred to by the Supreme Court of the United States as "a milestone agreement which, it was hoped, would end a long and troubled history of labor discord on the West Coast waterfront." *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 263–264 (1968). The funding of the M & M Agreement was left to PMA, rather than made a part of the collective bargaining agreement. A determination as to the best and most efficient method of funding the M & M Agreement presented PMA with several novel and difficult problems.

9. In 1960, although mechanized operations had begun on the West Coast, such as the introduction of packaged loads and packaged lumber, a general mechanization of the industry had not yet taken place. The most obvious innovation had been the introduction of container service by Matson Navigation Company (Matson), a PMA member. As a consequence, in 1960 and 1961, few, if any, of the West Coast vessel operators, save Matson, looked for savings in manhours because of a mechanization. Therefore the PMA members were divided into two groups with opposing interests. One group, including Matson, anticipated imminent, substantial manhour savings because of its containerized service. The second group, representing more than 90 percent of the steamship company members of PMA, anticipated that for the immediate future their operations would continue to be a conventional breakbulk cargo handling type of operation. This second group opposed a manhour assessment basis for funding the M & M Agreement because, under such an assessment, their labor costs per ton would increase as a carrier with an innovative operation reduced its manhours per ton.

10. To determine an appropriate method of funding the M & M Agreement, PMA formed the M & M Funding Committee which considered a number of alternative assessment methods. The Committee finally adopted a tonnage formula which had been used for a number of years to collect PMA dues. The Committee was not completely satisfied with the assessment formula but believed it to be the best available solution.

11. Tonnage was determined for the PMA assessment by the manner in which a particular type of cargo was manifested for shipment, except automobiles, which were assessed on the basis of measurement tons, regardless of how manifested. Automobiles can be manifested by weight, by measurement or by unit. In the foreign trades automobiles are manifested on "a unit basis on chartered ships, but weight and sometimes measurement is shown." In the coastwise trade "autos are manifested and freighted by weight."

12. The decision to collect the Mech Fund through a tonnage assessment rather than a manhour assessment was due to the belief of the breakbulk operators who constituted the bulk of the membership of PMA that increased containerization was going to reduce total manhours.

13. PMA refused to make any exception to its uniform tonnage tax although it was aware that such inflexibility was unsatisfactory. It refused to do so on the ground that it was "unable to arrive at a rationale for determining how exceptions should be made."

14. At the time, a Volkswagen vehicle had an average measurement tonnage of 8.7 tons (40 cubic feet equals 1 ton) and a weight tonnage of 0.9 (2,000 lbs. equals 1 ton). Thus, an average Volkswagen vehicle had a measurement tonnage approximately ten times its weight tonnage.

15. PMA did not submit its assessment plan to the Federal Maritime Commission for its approval in accordance with section 15 of the Act, and such approval was not given prior to the time such arrangement was put into execution. When Volkswagen, which was then shipping its vehicles itself, refused to pay the PMA tonnage tax, PMA brought suit against the stevedores handling its cargo for the moneys due. While this litigation was pending, the amount of the tax was paid into an escrow fund.

16. In January 1963, Volkswagen filed a complaint with the Commission challenging the underlying agreements among members of PMA and the acts taken in execution of such agreements as violating sections 15, 16 and 17 of the Act. PMA made itself a party to this proceeding by intervening.[4] Hearings were held on June 4, 1964. The

[4] *Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp., et al.*, 9 F.M.C. 77 (1965).

Examiner found no violations of sections 15, 16 or 17. The Commission agreed and dismissed the complaint. The Court of Appeals for the District of Columbia affirmed the Commission.[5]

17. On March 6, 1968, the Supreme Court reversed the Commission and the U. S. Court of Appeals, and held the agreement to be subject to section 15, and directed that the case be remanded for further proceedings. It further held that in determining whether sections 16 and 17 had been violated the corelation between charges and benefits must be reasonable. The Court pointed out: [6]

> When the vehicles were assessed for the Mech Fund by measurement, the assessment came to $2.35 per vehicle—representing, if passed on to the petitioner, an increase in unloading costs of 22.5%. If the vehicles had been assessed by weight (0.9 tons) rather than by measurement (8.7 tons), the assessment would have been 25¢ per vehicle—an increase of about 2.4%, comparable to the average Mech Fund assessment of 2.2% for all other general cargo. Assessment by measurement rather than by weight thus resulted in an assessment rate for the petitioner's automobiles of 10 times that for other West Coast cargo—although automobiles had less to gain than other cargo from the Mech Fund Agreement.

18. On March 11, 1968, the PMA filed two documents with the Commission,[7] related to the extension of the Mech Fund agreement from June 10, 1966, to June 30, 1971. One covered walking bosses, the other longshoremen and clerks. Bulk cargo was exempted from the assessment for walking bosses. The portion of the fund applicable to clerks was raised by a manhour assessment proportionate to clerk manhours to total manhours. All this corresponded to PMA's original cooperative working arrangement.

19. The Commission approved the basic agreement but ordered an investigation to determine whether the assessment agreement met the requirements of the Shipping Act as interpreted by the Supreme Court.[8] However, in the same order, the Commission strongly urged the parties to negotiate and settle their differences. The Commission also said:

> . . . It is beyond dispute that the establishment and maintenance of the Mech Fund by PMA has been a prime factor in the continued labor peace of the Pacific Coast, Aside from the relatively limited area of dispute raised here, the agreements appear to have operated to the satisfaction and benefit of all concerned and the public as well.

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[5] 125 App. D.C. 281; 371 F. 2d 747.

[6] *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261 (1968).

[7] "MEMORANDUM OF AGREEMENTS BETWEEN MEMBERS OF PACIFIC MARITIME ASSOCIATION REGARDING LABOR COST ASSESSMENTS," FMC Agreement No. T-2148 and "MEMORANDUM OF AGREEMENTS BETWEEN MEMBERS OF PACIFIC MARITIME ASSOCIATION REGARDING LABOR COST ASSESSMENTS RELATED TO VEHICLE HANDLING," FMC Agreement No. T-2149.

[8] Docket No. 68-18, *Order of Approval and Notice of Investigation*, March 28, 1968.

As a result of the Commission's urging, PMA requested Sam Kagel to act as an impartial umpire to determine a binding assessment formula for the funding of the M & M Agreement. Its purpose was to arrive at a satisfactory solution of the conflict between the conventional and innovative cargo handling points of view as described above.

20. Sam Kagel, an arbitrator and mediator of national reputation and wide experience in many industries including the maritime industry, was asked by PMA to make a final and binding determination of an assessment formula, subject to approval thereof by the Commission, which would fairly distribute the cost of the M & M Agreement and would not fall unfairly upon the stevedoring operations of any particular shipper nor place an unfair, undue or unreasonable burden on any particular stevedoring operation. Kagel was also instructed that any formula he recommended had to be compatible with the "benefit/charges" test announced by the Supreme Court in its decision in the *Volkswagen* case. He was also specifically directed to solicit the views of Volkswagen and its stevedores, as well as all other segments of the industry. Kagel arranged numerous meetings with representatives of all segments of the industry. He met on a number of occasions with attorneys for Volkswagen and also on several other occasions discussed their views by telephone and by correspondence.

21. Kagel encountered many basic disagreements between the members of the industry as to what would be an appropriate funding formula. The breakbulk carriers disagreed with the position of the container operators, and different positions were taken by carriers of bulk cargo, lumber, vehicles and other specialty carriers and shippers. Kagel's major role was to act as a mediator between the various conflicting segments of the industry. During his deposition in the present proceeding, he described his procedure as follows:

> But my actual technique in that instance in 1968 was to meet with each of these groups and to see how I could work out a formula which would be at least acceptable to all of the parties.
>
> And in the process of doing that, came up with different approaches and a number of them were discarded as we went along until we got down to the final formula. And my recollection is when we got down to the final formula that my last meeting with any individual group was with Volkswagen Mr. Herzfeld [counsel for Volkswagen] came here to San Francisco, in my office. And at that time I showed him what I was able to get all of the other groups to agree to. And he told me that would be satisfactory so far as Volkswagen [was concerned].

22. A principal goal in arriving at a new assessment formula was to reduce Volkswagen's costs—a result which as a practical matter Kagel took to be a main thrust of the Supreme Court's opinion. This result he accomplished. Kagel stated:

One of my primary objectives was to reduce the cost to Volkswagen, because but for the Volkswagen decision out of the Supreme Court I am assuming that that assignment would never have been made, so far as I was concerned.

And so the name of the game . . . was very clearly, "How could I redistribute the costs," so that Volkswagen's costs would be substantially less than it had been prior to that decision.

23. On September 16, 1968, Kagel issued his report, in which he determined that the M & M Funding Agreement should be amended by, among other things, introducing two new cargo categories, namely, automobiles and cargo in containers.

24. According to Kagel, the only feasible method of solving the problem was to meet with each of the several groups with variant interests and to work out a formula which would be at least acceptable to all of the parties. This was the only method in Kagel's view through which a satisfactory result would be achieved. This is, of course, the general procedure followed in collective bargaining agreements of which process the assessment agreement was a by-product. The result was not a "scientific formula" but something:

. . . that the parties all could live with, and most of them didn't like, particularly those elements in the industry which had to pay more than they had paid previously, they obviously didn't like that.

25. In the course of the negotiations Volkswagen advised Mr. Kagel that assessment by weight tonnage rather than measurement would meet its objection to the formula and would conform to the Supreme Court's instruction. Alternatively, Volkswagen proposed that automobiles should receive the same treatment as bulk cargo. Kagel considered these suggestions in the light of all the circumstances and the need for agreement. Kagel's recommendation gave automobiles neither of the two proposed alternatives. As stated earlier, the tonnage assessment contribution for bulk cargo were reduced from one-fifth to one-seventh the amount paid by general cargo. These reductions were made on the assessments against bulk and container cargo in order to secure the agreement of their carriers to a change in the PMA tax on automobiles.

26. When Mr. Kagel was asked how he arrived at these fractions, he answered:

And when you ask me how did I arrive at one-seventh or one-tenth or one-fifteenth, I didn't arrive at that, I worked it out between the parties.

27. The reason for reducing the tax on container cargo was to compensate for the money and capital investment involved in this type of transportation.

28. In the formula recommended by Kagel automobiles and trucks

were assessed for the Mech Fund one-fifth the amount paid by general cargo, which amount had been increased by the reduction in the amounts to be contributed by bulk and container cargo. No change was recommended in the assessment on automobiles and trucks for the Walking Boss Mech Fund.

29. According to Wobtrans, Kagel's formula ameliorated but did not eliminate the disproportionate increase in labor costs experienced by automobiles as compared with general cargo due to the Mech Fund assessment. Every five automobile tons were treated as the equivalent of one breakbulk ton. Accordingly, the increase in manhour costs for automobiles were reduced from being ten times as great as those for breakbulk cargo, to being twice as great. Volkswagen agreed not to oppose approval by the Commission of the revised M & M assessment formula but simultaneously put on the record that its acquiescence was not intended to foreclose it with respect to any other or future proceedings. Among the reasons for this agreement not to oppose Kagel's report was the (1) fact that Volkswagen would receive a substantial sum of money held in escrow pending resolution of the dispute, (2) that Volkswagen was anxious to cooperate in the achievement of stable and peaceful labor conditions on the West Coast. Although it felt the new agreement was not entirely in accord with the Supreme Court opinion, Volkswagen accepted Kagel's formula as doing rough justice.

30. Kagel, mindful of the Supreme Court opinion, had recommended modifications in the assessment agreement which substantially reduced the charge on automobiles and had sought to relate the benefits derived by various classes of cargo—including automobiles—to the charges imposed. The Commission in approving the new agreement said: [9]

> Agreement T-2210 differs from the two earlier agreements in establishing lesser assessment for certain types of cargo than the assessments against general cargo. Bulk cargo is assessed at 1/7, automobiles and trucks exclusive of truck trailers at 1/5 and cargoes in containers at 7/10, the general cargo rate.No party to this proceeding voices any objection to the new method of assessment. Furthermore the method embodies what appears to be a reasonable compromise of the positions of the various parties, which the Commission encouraged in its order instituting this proceeding, and was determined by the arbitrator to be in accordance with the guidelines enunciated in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261 (1968), the case which held that the Commission had jurisdiction over PMA's assessment agreements and directed the Commission to examine their lawfulness . . . .

The Commission expressed the caveat that its approval of the agreement:

[9] Docket No. 68–18, *Approval of Agreement T-2210 and Discontinuance of Proceeding,* January 17, 1969, p. 2.

. . . does not, of course, prevent the Commission's further consideration of the lawfulness of the assessment provided therein should consideration in the future appear proper.

Pay Guarantee Plan

31. In 1969, PMA and ILWU began negotiating with respect to the collective bargaining agreement to succeed the agreement due to expire on June 30, 1971. Both PMA and ILWU anticipated a continuous decline in the need for longshore labor in the Pacific Coast ports because of anticipated increases in productivity, primarily containerization.

32. By 1968, average longshore productivity on the Pacific Coast had substantially increased from its Mech Fund level. Whereas in 1960 and 1961, only .84 tons were being discharged per manhour, by 1968, this figure had increased to 1.5 tons, just short of twice the earlier figure.

33. The principal change involved in automobile handling subsequent to the Mech Fund was the introduction of specially designed vessels from which automobiles can be rolled on and off [Ro-Ro] instead of being lifted on and off through the use of ship's gear [Lo-Lo]. Ro-Ro carriage requires specialized vessels and is, therefore, distinct from conventional Lo-Lo handling.

34. The difference in productivity between the Lo-Lo carriage and Ro-Ro can be seen from Wobtrans' experience in handling vehicles in the Port of Los Angeles and the Port of San Francisco, transported under FIO arrangements. Ro-Ro operations are more than two but less than three times as productive as conventional automobile carriage.

35. The innovative cargo handling methods permitted by the Mech Fund resulted in steadily increasing average productivity on the Pacific Coast. Productivity has risen 300% since the original adoption of the Mech Fund in 1960–61 and 200% since the extension of that fund in 1966. This increase in productivity has resulted in a decline in manhours of employment on the Pacific Coast despite a steady increase in tonnage every year, except 1971, when a strike disrupted the waterfront. Following a small decline immediately after the adoption of the Mech Fund in 1961, hours worked in the Pacific Coast ports remained steady or increased until 1970 when they experienced a sharp decline.

36. Manhours declined between 1969 and 1970 despite an increase in total tonnage of two million tons and declined further in 1972, the next non-strike year, while total tonnage dropped only insignificantly. Although two million more tons were handled on the Pacific Coast in 1972 than in 1969, total manhours of employment have dropped

almost one-third. Both the increase in average productivity and the sharp decline in manhours employment reflect the increase in container carriage.

37. Between 1969 and 1972 the amount of container tonnage transported to the Pacific Coast ports almost doubled increasing from somewhat more than six millions tons to twelve million tons, while breakbulk carriage suffered a corresponding decline from nineteen million tons to little less than twelve and one-half million tons.

38. One of the purposes of the M & M Agreement had been to encourage the adoption of labor-saving devices on the West Coast. Hence, it became important to furnish some form of pay guarantee to insure workers a guaranteed income as work opportunity diminished. The concept of pay guarantee had actually been part of the first five-year M & M Agreement. A substantial portion of the Pay Guarantee Plan was modeled on the pay guarantee language of the original M & M Agreement.

39. When PMA and the ILWU began negotiations for a new contract in 1970, it was clear that some type of Pay Guarantee Plan in lieu of the M & M Agreement would be a necessary part of the collective bargaining agreement. The negotiations resulted in PMA-ILWU Memorandum of Understanding of February 10, 1972, and the Pay Guarantee Plan which was incorporated therein was, in effect, an extension of the M & M Agreement.

40. By a Memorandum of Understanding, dated June 24, 1973, the Pay Guarantee Plan was extended, and the employers' annual commitment was increased from $5,200,000 to $6,000,000. Also, the liability became fixed instead of contingent as it was under the original Pay Guarantee Plan. When the Pay Guarantee Plan in the Memorandum of Understanding of February 10, 1972, was ratified, PMA had to determine an assessment formula to fund the benefits under the plan.

41. Pending the determination of a final formula to fund the Pay Guarantee Plan, PMA decided to adopt an interim funding method based upon the formula approved for the M & M Agreement. This interim funding formula was incorporated into Agreement No. T-2635, which provided for interim funding to September 30, 1972, which as above noted has been extended from time to time. The Executive Committee of PMA acted as a "Funding Committee" to consider the manner in which longshore fringe benefits should be assessed under the Pay Guarantee Plan and the other fringe benefit plans. The Committee's discussions were similar to those of the original M & M Funding Committee. Once more, there were two conflicting interests—the conventional operator and the container operator. By this time, however, many of the operators who had been in the first

group were now in the second, and consequently a far lesser proportion of the membership was concerned about the effects of a manhour assessment. It became evident after a number of meetings that the Executive Committee could not reach a consensus, and Kagel was asked by PMA to consider the problem and make an appropriate recommendation.

Pay Guarantee Plan Assessment Agreement

42. Since the initiation of the Mech Fund, there has been relatively little change in the productivity of conventional automobile carriage (Lo-Lo). However, in addition to conventional automobile carriage automobiles were now transported on vessels from which they can be driven on and off under their own power (Ro-Ro). Vessels suitable for lift-on, lift-off handling cannot be used for Ro-Ro. The use of Ro-Ro ships requires new capital investment.

43. During the last ten years, there has been a steady increase in the number of Japanese and other imported vehicles, in addition to those carried by Wobtrans, entering the Pacific Coast ports.

44. The automobile tonnage of 5,233,750 for 1972 represents an increase of more than 300% over the 1963 tonnage of 1,554,429. Employment generated by automobile carriage has likewise increased since 1963. In 1972, Wobtrans alone employed 3,375 ganghours compared with 2,400 ganghours in 1963, or roughly 25% more labor. The cost per manhour of PMA's assessment has steadily increased for all cargo because of the increase in productivity and the decline in manhours of employment. In 1961, when the Mech Fund was first adopted, manhour assessments for fringe benefits constituted only slightly more than 10 percent of total direct labor cost per manhour; by 1969, such assessments represented close to 20 percent.

45. Unlike Kagel's role in connection with the M & M assessment agreement, as to which he was asked to make a final and binding assessment determination, Kagel was retained by PMA in an advisory capacity to act as an impartial umpire in recommending a Pay Guarantee assessment formula. Upon his appointment on April 20, 1972, Kagel solicited the views of all segments of the industry to assist him. In Kagel's letter to industry representatives, he listed alternative funding methods—namely, an hourly method, a tonnage method, and an hour-ton method—which had been considered by various study groups, and he discussed these three principal funding methods in his letter. Kagel received many responses to his letter from members of the industry in which various positions were taken as to an appropriate funding method. He circulated these responses to all parties who had

replied to his initial inquiry, and received no further comments.

46. Volkswagen, through its attorneys, communicated with Kagel by letter and by telephone on several occasions to present its views. One of Volkswagen's contentions was that the carriage of automobiles was not responsible for a decline in manhours. Volkswagen also asserted that the problem before Kagel was similar to that of the NYSA manhour tonnage formula, and submitted for Mr. Kagel's review, Volkswagen's exceptions to the Hearing Examiner's Initial Decision in the *NYSA* case (*Agreement No. T-2336—New York Shipping Ass'n*, 12 S.R.R. 639 [1971]), and its reply to the other exceptions filed in that proceeding.

47. In addition to his discussions with Volkswagen and other industry representatives and his study of the industry's views submitted to him, Kagel also reviewed the materials which were presented to him in his investigation and determination of the M & M funding formula.

48. On November 21, 1972, upon completion of his investigation, Kagel issued his recommendations for funding the Pay Guarantee Plan. He recommended that the funding formula for the M & M Agreement be adopted for the Pay Guarantee Plan. As a result, automobiles and trucks, exclusive of trailers, would be assessed 1/5 of the assessment for general cargo; bulk cargo would be assessed 1/7 of the general cargo assessment; and container cargo would be assessed 7/10 of the general cargo assessment. Kagel's recommendation was approved by PMA, and the Memorandum Agreement approving his recommendation is Agreement No. T-2635-2, which is the agreement pending before the Commission in this proceeding. The pay guarantee assessment against automobiles is on a measurement ton basis.

49. As above stated, the February 10, 1972, Memorandum includes a Pay Guarantee Plan which created a contingent liability of $5,200,000 payable at the rate of $100,000 per week contingent upon lack of work opportunities. The plan guaranteed 36 straight time hours per week to "A" men and 18 straight time hours per week to "B" men. As stated, the method of raising contributions to meet the guarantee was again left to the determination of the employers. Liability under the plan is contingent on lack of work opportunities and, as indicated, the PMA members are assessed under a formula identical with that of the Mech Fund.

50. In December 1972, PMA, at Kagel's recommendation, determined to fund the Pay Guarantee Plan by the same funding formula used during the interim period and set forth in No. T-2635, and on December 15, 1972, filed with the Commission Agreement No. T-2635-2. No. T-2635-2 recites that the funding formula expressed in No. T-2635 is adopted "until termination of the aforesaid ILWU-PMA

Pay Guarantee Plan and extensions thereof." The memorandum of February 10, 1973, had an expiration date of July 1, 1973. On June 24, 1974, PMA and the ILWU entered into a new "Memorandum of Understanding" to expire June 30, 1975, which increased the amount available to the "Pay Guarantee Plan" during the two years life of that agreement to a fixed fund of $6,000,000 each year. No new Pay Guarantee Funding Agreement has been made by PMA nor filed with reference to this June 24, 1973, Memorandum of Understanding.[10]

Effect on Wobtrans of Assessments Under Agreement No. T-2635-2

51. Wobtrans does not pay any assessments to PMA under Agreement No. T-2635-2. Assessments are against Wobtrans' stevedore contractors, who may pass along to Wobtrans the PMA assessments, although Wobtrans and its stevedores could negotiate otherwise. Total vehicles discharged by Wobtrans at West Coast ports in 1972 was:

Port	*Total Number of Vehicles (F.I.O. and T/C)*
Los Angeles	45,977
San Francisco	31,219
Columbia River and Portland	5,226
Seattle	4,086

Lo-Lo unloading costs per vehicle for F.I.O. and T/C movement were:

Port	*Unloading Costs Per Vehicle*
Los Angeles	$ 8.11
San Francisco	10.13
Columbia River	8.16
Seattle	8.69

52. PMA asserts on the basis of the above figures the weighted average unloading cost per vehicle discharged from Wobtrans' vessels in 1972 was $8.87: the Pay Guarantee Plan assessment (as of August 4, 1973) for automobiles was $.032 per ton; since an average Wobtrans vehicle measures 8.577 tons, the Pay Guarantee assessment on an average Wobtrans vehicle is 8.577 × $.032, or $.274 per vehicle. The clerk manhour assessment for the Pay Guarantee Plan as of August 4, 1973, was $.29 per hour. In the San Francisco Bay area, for 1972, Wobtrans stevedore, Marine Terminals, discharged an average of 0.96 vehicles per manhour. Consequently, PMA says that if Wobtrans had been assessed on a manhour basis, the per vehicle assessment for its operations in San Francisco for 1972 would have been 0.29 divided by 0.96, or $.302. The total of Wobtrans vehicles discharged at West Coast

[10]"The presiding officer on August 2, 1973, ruled that consideration of the funding of the Pay Guarantee Plan as continued and amended ". . . is both appropriate under and required by the Commission's Order of Investigation." *Procedural Ruling*, August 2, 1973.

ports was 86,508 vehicles in 1972, and an average Wobtrans vehicle measures 8.577 tons. Therefore, the total measurement tonnage of Wobtrans' vehicles discharged on the West Coast in 1972 was 741,979 revenue tons. The total PMA tonnage handled at West Coast ports in 1972 was as follows:

	Revenue Tons
Automobiles	5,233,750
General Cargo, including automobiles	36,002,287
All Cargo	59,437,877

Wobtrans' vehicles discharged in 1972 comprised only 14 percent of the total automobile tonnage, only 2.1 percent of the general cargo tonnage, and only 1.2 percent of all cargo.

53. None of the shippers or carriers of the remaining 86 percent of the automobile shipments has protested the assessments under Agreement No. T-2635-2.

54. As to the relative amount of Wobtrans' assessment, the total weighted PMA tonnage for 1972 was 40,689,409 revenue tons. The total assessments under Agreement No. T-2635-2 for all cargo (the full assessment) at $.16 per ton was $6,510,305. Wobtrans' assessment for the 741,979 revenue tons carried in 1972, at $.032 per ton, was $23,743. Thus, Wobtrans' assessment for 1972 was only .36 percent of the total assessments—even though it represented 1.2 percent of all cargo carried. (If experience proves that the assessment rate at $.16 per ton will result in more than the required $6,000,000, all per-ton rates will be proportionately reduced, so that Wobtrans' share of the $6,000,000 fund will be $6,000,000 × .36%, or $21,600.)

55. Wobtrans' $.274 per vehicle assessment is, when compared to its $8.87 per vehicle unloading costs, only 3 percent of its total unloading costs per vehicle. In 1972, the total West Coast longshore and clerk labor costs, exclusive of Pay Guarantee costs, were $175,867,000, and, when the $6,000,000 Pay Guarantee costs are added, the total labor cost was $181,867,000. The Pay Guarantee Plan represents 3.3 percent of the total labor costs. Therefore, under the Pay Guarantee assessment formula, Wobtrans pays a lesser proportion (3 percent) than that which the Pay Guarantee costs bear to the total labor costs (3.3 percent).

56. Whereas Wobtrans' assessment amounts to $.274 per vehicle, a commodity other than an automobile having the same measurement-to-weight ratio as Wobtrans' vehicles (8.577 measurement tons to 1.075 weight tons pays $1.37 (8.577 tons × $.16 per ton), or 5 times what Wobtrans pays. If the cargo is containerized, it pays $.96 (8.577 tons × $.112 per ton), or 3 1/2 times what Wobtrans pays. Therefore, cargo comparisons would appear to favor Wobtrans.

57. The record shows the following comparitive productivity figures for various types of cargo:

Cargo Category	*Manhours Per Ton*
Breakbulk	0.86
Lumber	0.48
Automobiles	0.12
Containers	0.28
Bulk	0.05

58. According to PMA, if these productivity figures are converted to assessments based upon manhours ($.29 per hour), the resulting manhour bases for these cargo categories can be compared with the Pay Guarantee assessment formula, as follows:

These figures show that if a manhour assessment is considered the "normal" method of allocating labor costs, automobiles and breakbulk cargoes are given a preference by the tonnage assessment of the Pay Guarantee assessment formula, whereas lumber, containers and bulk cargoes are at a disadvantage.

59. PMA says and submits detailed data analyses to prove that Wobtrans has through increased use of Ro-Ro and other innovative means increased the productivity of its labor. Beginning in 1969 there has been a steady increase in Wobtrans' use of Ro-Ro vessels as shown by the following summary:

60. The difference in productivity in San Francisco for Wobtrans' Lo-Lo and Ro-Ro vessels for 1972 was as follows:

61. PMA submits the history of Wobtrans' tonnage decline since 1969 as follows:

62. The Joint Stipulation of Facts submitted by the parties to this proceeding includes a productivity figure for automobiles of 8.6 tons per manhour as of 1972. Using this figure, PMA calculates the decline in manhours resulting from Wobtrans' decreased carryings since 1969 can be approximated as follows:

63. PMA submits that Wobtrans' increased use of Ro-Ro vessels in recent years has further contributed to a decrease in manhours because of their high productivity. Using the 2.56 comparative ratio between Lo-Lo and Ro-Ro productivity figures, PMA figures the loss in manhours from Wobtrans' use of Ro-Ro vessels since 1969 can be estimated as follows:

64. A summary of approximate decline of manhours (using 1969 as a base year) resulting from (a) Wobtrans' decreased carryings, and (b) its shift to Ro-Ro vessels, is as follows:

65. Longshore labor costs on the West Coast have increased from $4.13 per hour in 1960 to $8.87 per hour in 1972. Wobtrans' per-vehicle unloading costs have decreased from $10.45 in 1960 (the *Volkswagen* case, 390 U.S. at 265) to $8.87 in 1972. Since the productivity of Wobtrans' Ro-Ro vessels is 2.56 times that of its Lo-Lo vessels,

Wobtrans' per-vehicle unloading cost for its Ro-Ro vessels in 1972 was $8.87 divided by 2.56, or $3.46. Consequently, using Ro-Ro vessels Wobtrans has reduced its per-vehicle unloading costs from $10.45 in 1960 to $3.46 in 1972.

66. In his investigation of a Pay Guarantee assessment formula, Kagel considered the productivity increases of Wobtrans, in having an opportunity under the PMA-ILWU collective bargaining agreement to ship its automobiles to the West Coast on its highly productive Ro-Ro vessels.

67. On the basis of the data submitted by the parties and included in the record, as well as the analyses of that data both by the witnesses and in the briefs, it appears that—particularly during the period from 1969 to 1972—Wobtrans through the introduction and use of Ro-Ro vessels and other more efficient means has substantially increased—in some instances between two and three fold—the productivity of the labor engaged in its stevedoring activities. As a result, its labor costs have substantially diminished. These benefits flow from the underlying collective bargaining arrangements between PMA and ILWU which resulted in the Pay Guarantee Plan which is funded by the assessment formula under consideration herein. It also appears that, while no precise mathematical equation is practicable between benefit and burden, there does not appear to be any marked disparity between benefit and burden as between automobiles and various other types of cargo.

68. Although diminishing work opportunity was one of the principal concerns of the ILWU in seeking a Pay Guarantee Plan, the benefits which longshoremen receive under the plan are not solely related to declining work opportunity.

69. It is unlikely that the Pay Guarantee Plan will be discontinued when there is sufficient work for all longshoremen, and in fact there is presently, and was in 1972, sufficient work for most of the established work force. The principal concerns of the ILWU in negotiating the Pay Guarantee Plan were that (1) longshoring in some ports is highly seasonal, (2) because ships often arrive in groups or not at all, longshore work comes in peaks and valleys, and (3) trades may dry up and ports may die.

DISCUSSION AND CONCLUSIONS

The principles which govern this case are found in the opinions of the Justices of the Supreme Court in the *Volkswagen* case in 1968.[11] Justice Stewart for the majority found that the M & M funding agree-

[11] *Volkswagen v. F.M.C.*, 390 U.S. 261, 279, *et seq.*

ment (lineal ancestor of the agreement now before us) was required by section 15 of the Act to be "approved, disapproved or modified." Of necessity, that would require decision on remand whether sections 16 and/or 17 were violated by the agreement. Accordingly, the Justices each gave some guidance to the Commission in the "handling of these issues." [12]

Justice Stewart wrote: [13]

> The Commission ruled that the petitioner had failed to demonstrate any "undue or unreasonable prejudice or disadvantage" under §16 solely because it had not shown any unequal treatment as between its automobiles and other automobiles or other cargo competitive with automobiles. In so ruling the Commission applied the "competitive relationship" doctrine which it has developed in cases concerning rates for carriage of goods by sea. But the Commission in cases not involving freight rates and the particularized economics that result from a vessel's finite cargo capacity, has often found §16 violations even in the absence of a "competitive relationship." . . . When the agreement in the present case is filed, the Commission may consider anew whether the mere absence of a competitive relationship would foreclose further §16 inquiry.

The Court's instruction with regard to section 17 was somewhat more trenchant: [14]

> With respect to Section 17, the Commission found that the assessment upon petitioner's automobiles was not "unreasonable," because the petitioner had received "substantial benefits" in return for the assessment, and there was no showing of a deliberate intent to impose an unfair burden upon the petitioner. This, we think, reflects far too narrow a view of §17. It may be that a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under §17, even though not all members of the group receive equal benefits. . . . But here a relatively large charge was unequally imposed. The benefits received by the petitioner may have been substantial, but other cargo received greater benefits at one-tenth the cost. Moreover, the question of reasonableness under §17 does not depend upon unlawful or discriminatory intent. . . .[15]
>
> The question under §17 is not whether the petitioner has received some substantial benefit as the result of the Mech Fund assessment, but whether the correlation of that benefit to the charges imposed is reasonable. The "substantial benefits" measure of unreasonableness used by the Commission in this case is far too blunt an instrument. Nothing in the language or history of the statute supports so tortured a construction of the phrase "just and reasonable." . . . The proper inquiry under §17 is, in a word, whether the charge levied is reasonably related to the service rendered.

Mr. Justice Harlan in his concurring opinion elaborated on the effect of the assessment agreement in the light of the commands of sections

[12] "The Commission will be called upon again to consider the effect of §§16 & 17 since an agreement that violates a specific provision of the Act must be disapproved. Accordingly, it is not inappropriate without now passing upon the ultimate merits of the §§16 & 17 issues to give brief consideration of the Commission's handling of those issues on the present record."

[13] 390 U.S. 279.

[14] *Ibid*, p. 280, *et seq.*

[15] The Court quoted the Commission:

> [Sections 16 and 17] proscribe and make unlawful certain conduct, without regard to intent. The offense is committed by the mere doing of the act, and the question of intent is not involved." *Hellenic Lines Ltd.—Violation of Sections 16 (First) and 17*, 7 F.M.C. 673, 675–676 (1964).

16 and 17 of the Act. Remarking that the agreement was unlike any which had previously been considered by the Commission and involved an issue of "first impression." He then said, in part: [16]

> . . . the agreement levied a "tax" on Association members, which . . . would be used to pay for a general benefit to the shipping industry, but the allocation of that tax bore no direct relationship to benefits received by customers.
>
> The real difficulty in this case is to formulate a workable definition of whether the burdens have been "unfairly" allocated. . . . The fact that all automobiles are treated alike should not have prevented the Commission from inquiring whether special treatment for this class of goods was necessary under the circumstances and, if so, whether the special rule adopted was the fairest that could be devised.
>
> The Commission's interpretation of §17 was also erroneous. The Commission held that since petitioner received substantial benefits from the modernization program it would not make minute inquiry into whether petitioner's benefits precisely corresponded to the costs imposed. The first difficulty is with the conclusion that petitioner received "substantial benefits." . . . It may be that those who will directly benefit from modernization and those who will benefit only from increased stability during the course of a modernization program in which they have no interest (and which others have imposed on them) should both pay part of the cost of the Mech Fund. However, the existence of such a categorical difference between the benefits received by different groups should at least invite inquiry whether charges are as appropriately proportioned as would be feasible.
>
> . . . Of course charges need only be "reasonably" related to benefits, and not perfectly or exactly related, *Evans Cooperage Co. v. Board of Commissioners of the Port of New Orleans*, 6 F.M.B. 415, 418, but in this case inquiry ceased before it had reached even that nearer point.

Mr. Justice Fortas, agreeing that the agreement was required to be filed under section 15, remarked that the Court's opinion did not purport to "determine the effect of §§16 and 17 [on the allocation agreement] and I believe that the Court certainly should not do so."

While Justice Douglas could not "say that the Commission erred in finding no violation of §16" he agreed that the case should be remanded to the Commission for further findings under section 17. In a footnote Justice Douglas described the impact of the agreement on the carriage of petitioner's automobiles [17] and the disproportion between the benefits received by petitioner and the charges imposed upon his cargo as compared with other cargo. He agreed that the "substantial benefit test" represents too narrow a view of section 17:

> . . . To focus an inquiry solely on the benefits received may obscure the disparity between the charges ultimately falling upon petitioner and those exacted from other shippers. The Commission should compare the benefits received with the charges imposed on petitioner's cargo and with those levied upon other cargo, which receives substantially similar benefits, before the question of reasonableness can be resolved. This determination is for the Commission to make in the first instance.

[16] *Ibid*, pp. 291–293 [footnotes deleted].
[17] 390 U.S. 26; 315 (footnote 30).

Hence, without specifying what assessment allocation arrangement would satisfy the requirements of sections 16 and 17, all the Justices (save, possibly Mr. Justice Fortas) clearly indicated that the assessment formula under attack by petitioner (Volkswagen) would not. The Court pointed out that the Mech Fund assessment charged petitioner's automobiles $2.35 per vehicle representing an increase of 22.5 percent in unloading cost whereas if charged by weight the increase would have been 25¢ per vehicle—an increase of about 2.4 percent which it noted was "comparable to the average Mech Fund assessment of 2.2 percent for all other general cargo. This was the nub of the Court's consideration of petitioner's plight under the assessment agreement. The Court, quite pointedly, drew attention to the apparent inequity involved. It said: [18]

> Assessment by measurement rather than by weight thus resulted in an assessment rate for petitioner's automobiles of 10 times that for other West Coast cargo—although automobiles had less to gain than other cargo from the Mech Fund agreement.

In summary, the Supreme Court marked out the general area but not the exact bounds within which to determine whether the assessment agreement meets the minimum tests necessary to avoid the prohibition of sections 16 and 17 of the Act. However, all members of the Court concurred in the judgment which left to the Commission the duty to make the judgment initially whether in all the relevant circumstances, the agreement gave "any undue or unreasonable preference or advantage to any description of traffic in any respect whatsoever" (section 16) or imposes "unjust or unreasonable regulations or practices relating to or connected with the receiving, handling, storing or delivering of property" (section 17).[19] Specifically, the Court determined that the mere lack of a "competitive relationship should not have foreclosed further inquiry under §16" and that the "proper inquiry under §17 is, in a word, whether the charge levied is *reasonably* related to the service rendered." (Emphasis supplied.) In other words, whether, broadly speaking, the petitioner is getting a "fair shake." It was not the Court's intention to set a precedent for the substitution of its judgment for that of the Commission or to impose a rigid procedural mold on the elasticity of the administrative process in this sensitive and vital area of maritime commerce. The Court said that the "substantial benefit" test applied by the Commission to the earlier funding agreement was "far too blunt an instrument" with which to fashion compliance with sections 16 and 17 of the Act.

[18] 390 U.S. 261, 266.

[19] In the latter event the Commission may "determine, prescribe and order enforced a just and reasonable regulation or practice." 46 U.S.C. §816 (§17).

Indeed, the Court characterized the Commission's reading of the statutory phrase "just and reasonable" as "tortured." "Substantial" benefit to Volkswagen could not alone render the formula just and reasonable.

However, a fair reading of the several opinions of the Justices leads to the conclusion that in determining what is "just and reasonable" under the test laid down by the Court in the particular circumstances of a given case it is not necessary to make minute inquiry whether the benefits received by one type of cargo precisely correspond to the benefits received by a different type of cargo. It is sufficient if any disparity which may result falls within reasonable tolerances. Indeed, Mr. Justice Stewart specifically recognized that a "relatively small charge" imposed uniformly for the benefit of an entire group can be reasonable under section 17 even though not all members of the group received equal treatment [390 U.S. 281] and Mr. Justice Harlan said that disparity of benefit should at least "invite inquiry" whether the charges were "appropriately proportioned." The Court appears implicitly to have recognized that to require a precise balancing of burdens against benefits within the frame of the complicated structures and many-faceted interests which compose the maritime/labor complex on the West Coast of the United States would be impractical, if not impossible without risking serious consequences to the maritime commerce of the United States.

The new formula as above stated was worked out in protracted negotiations among the interested parties and constitutes a more reasonable a solution to the sensitive and difficult problems presented by the need for an assessment agreement acceptable to a large number of parties with variant interests than any method of theoretical evaluation of benefits against burden could have produced.

While the agreement herein may not be, and quite surely is not, in perfect accord with ideal and theoretical concepts of justice and probity, it may well be the best solution within the general frame prescribed by the Court that could be devised and agreed upon in all the circumstances by all the parties whose positions were entitled to be heard and taken into account. Certainly, it appears to constitute a rough equation of benefits against burden accruing to automobile cargo as contrasted with other types of cargo affected by the agreement.

Concededly, the burden on Volkswagen was greatly reduced—i.e., from 10 times to twice that of breakbulk. The result was not a "scientific" formula, but a negotiated settlement that all the parties accepted and could "live with" which did substantial justice within the frame set out by the Supreme Court.

It should be noted in passing that the catalyst of the Supreme Court's rejection of the Commission's "substantial benefit" test of compliance with sections 16 and 17 of the Act was the gross disparity in the effect of the original M & M assessment formula on automobiles as against other cargo. Also, PMA "was dominated by common carriers" whose intent was said to be and may well have been to "shift a disproportionate share of the Mech Fund assessment" onto Volkswagen "which did not patronize those common carriers." In a footnote to his opinion, Justice Stewart quite pointedly remarked that both the committee of PMA which devised the assessment formula and the one which later ruled on claims of inequities were made up entirely of carriers: "neither committee had a single member who was a stevedoring contractor or terminal operator although there were many such in PMA." (390 U.S. 267). While these practical circumstances of commercial "competition" may not have been definitive of the Court decision they clearly played a part and to some degree affected the result.

Also, it should be observed that it was not the use of measurement rather than weight in assessing automobiles or the fact that the formula may have been arrived at by agreement among interested parties that the Court found objectionable. Rather it was failure of the Commission to consider the relative impact of the benefit/burden realities on various types of cargo. This seems clear from the Court's emphasis on the disproportionate burden originally imposed on Volkswagen.

Wobtrans argues that PMA has made no real attempt to deal with the "central issue" in the case as defined by the Supreme Court which is whether "the special rule adopted" in the agreement with respect to automobiles "was the fairest that could be devised" which Justice Harlan said should be the objective, in his concurring opinion in *Volkswagen* (390 U.S. 293–294). Wobtrans says it is obvious that PMA made no attempt to corelate benefits and burdens, and, as Kagel "repeatedly" made clear, the formula by which the Pay Guarantee Plan is being funded was arrived at by mediation, and not through corelation of benefits and burdens. Wobtrans complains that instead of attempting any affirmative justification for its formula PMA in the record and its briefs concentrates on attempting to show that "for a variety of reasons the burden on automobiles is different from that which drew the cricicism of the Supreme Court in the earlier decision."

As indicated above, we do not read the Supreme Court's dictum or any subsequent Commission instruction to prescribe any particular method of arriving at an assessment formula under a funding arrangement such as here involved. Nor is there any indication that the courts

or the Commission has proscribed mediation among interested parties —including complaining parties—as an appropriate method to arrive at a solution of such a funding problem provided the result is workable in the real world of maritime commerce and labor relations and at the same time meets the test required by the language of sections 16 and 17 as interpreted by the Commission in the light of the Supreme Court's dicta in the *Volkswagen* case. We think the agreement herein accomplishes that result.

It would be fruitless and nonproductive to expand this opinion by a further recitation, rehash and comment in detail on the plethora of statistical data, argumentation and analyses which are presented in the record and the able briefs of counsel. The exhibits and briefs have been carefully read and considered. The record fully establishes that, in arriving at the funding formula embodied in the M & M funding agreement and now carried forward into the agreement before us, Kagel, acting on the instructions of PMA and with the approval of the Commission, took adequate account of the burden/benefit requirement laid down by the Supreme Court. As appears from the findings herein and in more detail in the record and briefs of the parties upon which they are based, the formula included in the Pay Guarantee Funding Agreement—while perhaps not as favorable to Wobtrans as it could have been without tipping the scales in the opposite direction—cannot be said to be outside the perimeter of reasonable relation between burden and benefit required of such agreements by sections 16 and 17 of the Act.

Several particular matters stressed in the briefs require some comment. The Commission in a recent similar case involving some of the same issues and parties recognized the difficulty of precise equation of benefit with burden by a "scientific formula" in an assessment agreement similar to that here involved. In *Transamerican Trailer Transport, Inc. et al. v. New York Shipping Association,* 18 S.R.R. 73, 91 (subsequently referred to as *NYSA*), the Commission in determining an appropriate assessment formula within the frame laid down by the Supreme Court in *Volkswagen* frankly adopted a "reasonable compromise" between differing positions put forward by the parties to meet their contending interests.

It, in effect, "split the difference" between these various proposals in adopting the "weight-ton formula" as satisfying the Supreme Court's requirement that the "costs which automobiles suffer are reasonably related to the benefits they receive." In addition, the Commission noted the recommendation of members of the assessment committee that the weight ton formula be adopted, and the willingness of

two of the interested parties to accept that formula as an "alternate solution to end litigation."

The relation of the *NYSA* case to that at hand is discussed in detail by both parties in their briefs. As above noted, Wobtrans raised the appropriate questions with Kagel and submitted the NYSA proposed findings and briefs to Kagel for his consideration. However, Kagel concluded that and we agree, the NYSA matter was a different assessment arrangement, to fund a different plan under a different collective bargaining agreement involving assessment for multiple fringe benefits. As PMA points out, the assessment discussed in *NYSA* was to meet NYSA's obligations as to (1) pensions, (2) welfare and clinics, (3) guaranteed annual income, (4) "shortfall" of actual hours worked at the Port of New York, and (5) administrative expenses of NYSA (11 S.R.R. at 836). The total obligations were in excess of $70,000,000 per year. The total obligation under the Pay Guarantee Plan is $6,000,000 and covers only a pay guarantee benefit. PMA assessment for other fringe benefits similar to those of the NYSA plan (vacations, pensions, welfare) are funded on a manhour basis. Therefore, any comparison of the West Coast situation with the *NYSA* case must take into account that *all* benefits under the NYSA plan are assessed on a manhour/tonnage basis, whereas all but one of the PMA-ILWU fringe benefits are calculated on a man-hour basis.

A number of other comparisons are made between the NYSA agreement and the PMA agreement here under consideration. A number of arguments are made by Wobtrans, most of which were rejected by Kagel which were designed to apply the weight ton formula to this case on analogy to the Commission's *NYSA* opinion. These arguments are not convincing in view of the wide differences in circumstances and arrangements underlying the two cases.

Nor do we agree with Wobtrans' position that the "Court as a whole squarely repudiated the doctrine that an assessment satisfied the Shipping Act if it was generally reasonable and administratively convenient." As above indicated, the Court was influenced by the obvious unreasonableness of the original M & M funding formula leading to a gross disproportion between burden and benefit; and the complete absence of any attempt by the Commission to relate burdens to benefits. Indeed, as we have pointed out earlier therein, not an exact or precise relation of burden to benefit but one which, after due consideration of the relevant circumstances of the particular case, reasonably relates such burdens to benefits, satisfies the requirements of the Act. If this is an improper reading of the Court's opinion it will doubtless be corrected on appeal.

Nor does the implication of unfairness or bias indicated in the Court's opinion apply to the subsequent history of the consideration and development of the present formula. There is no evidence-indeed no allegation—that the cards were stacked against Wobtrans in the selection of Kagel or in his consideration of the M & M funding formula or in his recommendation that the same or a similar formula be incorporated into the Pay Guarantee funding arrangements. It is not without significance that Wobtrans accepted Kagel's determination in the former case—albeit with some reservations.

Finally, Wobtrans says Kagel failed to take account, in his consideration of the Pay Guarantee Funding Formula, that:

(a) Volkswagen had agreed to assessments in accordance with the earlier formula in consideration of moneys from the escrow fund which balanced out the discrimination against its cargo, (b) Volkswagen had acceded to the Mech Fund formula solely by way of compromise and to maintain waterfront harmony and (c) automobiles have not been responsible for any decline in man-hours worked by ILWU members for the period from 1968 to date.

In considering both the Mech Fund formula and the Pay Guarantee formula Kagel solicited and received detailed statements from Wobtrans' counsel who were afforded an opportunity to present such views and facts as they chose. These submissions—both written and oral—were duly considered by Kagel in connection with his consideration of those submitted by other interested parties.

There appears to be no doubt that Wobtrans either fully presented or was afforded ample opportunity fully to present whatever arguments or facts it felt to be important and useful to its cause—including those it now asserts were not considered by Kagel.

While of course we cannot say that in abstract terms the funding agreement is the "fairest" that could conceivably have been devised, one who has considered the record in this proceeding cannot help but be convinced that the method used by Kagel of arriving at a funding formula was within the frame of the Supreme Court's interpretation of the Act. Indeed, it was quite probably the only reasonably feasible method in the circumstances. One must be equally convinced that, within reasonable tolerances, the result while not ideal meets the tests laid down by the Supreme Court under sections 16 and 17 of the Act.

Agreement No. T-2635-2 does not give any undue or unreasonable preference or advantage to any other cargo over automobiles in violation of section 16 of the Act nor is the assessment being charged automobiles an unreasonable practice related to receiving, handling, storing or delivering property in violation of section 17 of the Act.

Agreement No. T-2635-2 is not unjustly discriminatory or unfair as

regards the carriage of automobiles and accordingly may be approved pursuant to section 15 of the said Act.

(S) ASHBROOK P. BRYANT,
Administrative Law Judge.

WASHINGTON, D.C.,
February 6, 1974.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 463

MAFATLAL LTD.

v.

SCINDIA STEAM NAVIGATION CO. LTD.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

August 13, 1974

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on August 13, 1974.

It is ordered, That applicant is authorized to refund $69.26 of the charges previously assessed Mafatlal Ltd.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket 463 that effective April 27, 1974, for purposes of refund or waiver of freight charges on shipments which may have been shipped from India during the period from April 27, 1974, through May 10, 1974, the rate on 'Jute Bagging for Cotton Bale Covering', is $35.25 CBM subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

It is further ordered, That refund of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 463

MAFATLAL LTD.

v.

SCINDIA STEAM NAVIGATION CO. LTD.

Scindia Steam Navigation Co. Ltd., permitted to refund a portion of the freight charges.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE [1]

Scindia Steam Navigation Company, Ltd., has requested permission to refund a portion of the freight charges on a shipment of jute bagging for cotton bale covering under a bill of lading dated April 27, 1974. Scindia booked a shipment of 92.3523 CBM of jute bagging for cotton bale covering from Calcutta, India, to San Francisco, California. Through error Scindia charged a rate of $36.00 per cubic bale meter.

Effective March 15, 1974, there was a general increase in rates of 12.5 percent. The rate in effect prior to the increase was $31.25 per cubic bale meter. As increased it would be $35.25 per cubic bale meter. Due to clerical error a rate of $36.00 per cubic bale meter was instead published in the tariff. Therefore, the rate applicable at the time of the shipment under The Scindia Steam Navigation Co., Ltd., Tariff, F.M.C. No. 13, East Coast of India & Bangladesh to U. S. & Canadian Pacific Coast Ports, page 21, effective March 15, 1974, was $36.00 per cubic bale meter. This rate yielded a total freight for the shipment of $3,324.68. The proper rate of $35.25 would have yielded a total freight of $3,255.42.

Authority is sought to refund the difference between the applicable rate and the rate charged, or $69.26. Scindia alleges there was no other shipments of the same or similar commodity moved during approximately the same period of time at the rate applicable at the time of the shipment here involved.

Section 18(b)(3) of the Shipping Act, 46 USC 817, as amended by

[1] This decision became the decision of the Commission 8/13/74

Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the applicable law. Briefly it provides that the Federal Maritime Commission may, in its discretion and for good cause, permit a common carrier by water in the foreign commerce of the United States to refund a portion of the freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where there is an error in a tariff of a clerical or administrative nature and such refund or waiver will not result in a discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. All these requirements have been met.

Finally, the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

Applied to the instant situation, it is found that refund of the difference between the applicable rate and the rate charged may be allowed.[2] Accordingly, respondent Scindia Steam Navigation Co., Ltd., is hereby permitted to refund the sum of $69.26, which represents the difference between the rate of $35.25 per cubic bale meter and the rate of $36.00 per cubic bale meter. The notice of refund shall be published in Scindia's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D. C.,
July 18, 1974.

[2] *Hawaiian Agricide & Fertilizer Co., Ltd. v. Micronesia Interocean Line, Inc.*, Special Docket No. 404, 12 F.M.C. 322 (1969); *U. S. Department of Agriculture v. Tropwood Lines*, Special Docket No. 449, 10 SRR 1080 (1972); and *U. S. Department of Agriculture v. Waterman Steamship Corporation*, Special Docket No. 451, 13 SRR 540 (1973).

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–74

MODIFICATION OF ARTICLE 4 AGREEMENT NO. 3302— THE ASSOCIATION OF WEST COAST STEAMSHIP COMPANIES

Evidence adduced is insufficient to render judgment that would modify the unanimity voting provision in Agreement 3302 of the Association of West Coast Steamship Companies (ASSWESTCO) as it relates to decisions affecting rates.
Proceeding is referred to the Office of Administrative Law Judges for hearing and the development of a record adequate to the formulation of a reasoned decision.

Donald J. Brunner and *Stephen T. Rudman,* Hearing Counsel.

REPORT

BY THE COMMISSION: (Commissioners Barrett, Hearn and Morse; Chairman Bentley and Vice Chairman Day concurring)
Decided 9/23/74

By Order served November 15, 1973, the Commission, pursuant to sections 15 and 22 of the Shipping Act, 1916, directed the Association of West Coast Steamship Companies (ASSWESTCO) to show cause why Article 4 of ASSWESTCO Agreement No. 3302 should not be modified "to reduce the voting requirements in any decision affecting rate changes from unanimity to something less than unanimity, such as two-thirds or three-fourths." This action was based upon information on file with the Commission indicating that member lines of ASSWESTCO have attempted in the past to reduce such voting requirements in the conference agreement from unanimity to two-thirds majority vote. However, because the institution of such a change itself requires unanimous approval of the member lines under Article 4 of the ASSWESTCO agreement now in effect, such efforts have apparently been thwarted by the lone dissenting vote of one member line, Flota Mercante Grancolombiana, S.A. (Grancolombiana).

The only response filed pursuant to the Commission's Order to Show Cause was a Memorandum of Law submitted by Hearing

Counsel. None of the respondents submitted affidavits, memoranda, or requests for hearing as permitted under the Order to Show Cause.

BACKGROUND

The unanimous voting procedure at issue was introduced at the time ASSWESTCO was organized in 1934, and has been retained through the years. It is clear from information before the Commission, however, that nine of the 10 ASSWESTCO member lines may now wish to amend the Article 4 unanimity provision and adopt a majority vote provision, but are being effectively blocked in such efforts by Grancolombiana.

The member lines' positions were last presented to the Commission on November 19, 1973, when ASSWESTCO submitted to the Commission a copy of a letter mailed to its member lines on that same day which addressed itself specifically to the Commission Order. It read in part:

> Since the Conferences' position has been clearly stated to the FMC, it is the Chairman's position that further clarification from his office is unnecessary. Should any memberline have changed their position since the last voting on this matter, we ask that the Chairman be notified at once. Should any memberline desire that the Chairman submit an affidavit, please so inform and a special meeting will be held to discuss this matter.

This informal letter was the only correspondence received by the Commission following issuance of its Order to Show Cause from either ASSWESTCO or its member lines prior to the December 17, 1973, deadline for the filing of responses thereto.

Hearing Counsel, in their Memorandum of Law submitted in response to the Order, argued that the ability of one member line to utilize the unanimity rule of Article 4 to frustrate the wishes of almost all of the other member lines of ASSWESTCO "is clearly conduct detrimental to the commerce of the United States." They therefore urged the Commission to modify Agreement No. 3302 to provide for a two-thirds majority for any decision taken by members of ASSWESTCO with regard to rate changes.

Not until January 17, 1974, did Grancolombiana submit a letter to the Commission, in which it suggested surprise at the recommendation of Hearing Counsel and reiterated its opposition to any amendment of Article 4.

DISCUSSION AND CONCLUSIONS

The Commission considers it most inappropriate that ASSWESTCO and its member lines failed to respond in this proceeding under the

procedures set forth in the Order to Show Cause. While we presume that all Respondents felt that their positions on the matter at issue had previously been adequately presented, albeit informally to the Commission, with no need for restatement, the fact remains that there was a breakdown in complying with a properly issued Commission Order in a proceeding undertaken primarily to investigate and protect Respondents' individual and collective interests. While the Commission might attempt to render a judgment in this case based solely on the documentary evidence now available to it, we believe that due process considerations require that this proceeding be assigned to the Office of Administrative Law Judges for hearing. Only through the development of a complete record with full opportunity for parties to be heard will the best interests of the Association, the individual member lines and the public be served.

Therefore, pursuant to its authority under section 15 of the Shipping Act, 1916, the Commission here by refers this proceeding to the Office of Administrative Law Judges for hearing to determine whether Article 4 of ASSWESTCO Agreement No. 3302 should be modified to provide for less than unanimous voting in any decision affecting rates. An appropriate order will be entered.

Chairman Helen Delich Bentley and Vice Chairman James V. Day, concurring:

Although we are of the opinion that the documentary evidence available to the Commission in this case could be determined as sufficient to render judgment, we defer to our colleagues in the referring of this matter to the Office of Administrative Law Judges.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–74

MODIFICATION OF ARTICLE 4 AGREEMENT NO. 3302— THE ASSOCIATION OF WEST COAST STEAMSHIP COMPANIES

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine, inter alia, whether Article 4 of Agreement No. 3302—Association of West Coast Steamship Companies (ASSWESTCO) should be amended to provide for a less than unanimous vote for any decision effecting rate changes. The Commission has fully considered the matter and has this date made and entered of record a Report containing its findings and conclusion thereon, which Report is hereby referred to and made a part hereof. The Commission found that the record in this proceeding was inadequate to formulate a fair and reasoned decision.

Therefore, For the reasons enunciated in said Report,

It is ordered, That Docket 73–74 is hereby referred to the Office of Administrative Law Judges for hearing and the development of a record adequate to determine whether modification is necessary of the unanimity provision of Article 4, ASSWESTCO Agreement No. 3302, as it relates to decisions effecting rates.

It is further ordered, That the presiding Administrative Law Judge shall, based on his findings of fact and conclusions of law, issue an Initial Decision that determines what modification, if any, is necessary regarding the unanimity provision at issue.

It is further ordered, That all member lines of ASSWESTCO shall be named respondents in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 72–30

COMMODITY CREDIT CORPORATION AND UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

v.

LYKES BROTHERS STEAMSHIP CO., INC., ET AL.

NOTICE OF ADOPTION OF INITIAL DECISION

October 31, 1974

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 31, 1974.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 72–30

COMMODITY CREDIT CORPORATION AND UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

v.

LYKES BROTHERS STEAMSHIP CO., INC., ET AL.

A war risk surcharge on relief shipments to Lebanese ports was not violative of sections 15, 16 and 17 because transportation factors, such as risk and port congestion, were present.

Barry D. Hersh for complainants.

Edward S. Bagley for respondents Gulf/Mediterranean Ports Conference, Lykes Bros. Steamship Co., Inc., and Hellenic Lines Ltd.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE [1]

This complaint proceeding is before me on a motion for summary judgment filed by respondents Lykes Bros. Steamship Co., Inc., Hellenic Lines Ltd., and the Gulf/Mediterranean Ports Conference. The case arose from a complaint filed by the Commodity Credit Corporation (CCC) and the Agency for International Development (AID) [2] against the North Atlantic/Mediterranean Freight Conference, and its member lines, the respondents already noted above, and the independent lines, D. B. Turkish Cargo Lines and Jan C. Uiterwyk Co.

The complaint, as amended, charges respondents with violations of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 814, 815, 816 and 817) because of their imposition of a "war risk surcharge" on shipments to Lebanese ports. The period involved is from November 22, 1969, through February 1973. Reparation in the amount of $91,080.14 was sought by complainants.

CCC and AID are charged with the responsibility for shipping relief

[1] This decision the decision of the Commission 10/31/74

[2] AID and CCC are sometimes collectively referred to herein as the Government.

cargoes as part of programs under Title II of Public Law 480—83rd Congress, (68 Stat. 457, 7 U.S.C. 1721, *et seq.*), and the provisions of the Foreign Assistance Act of 1961, as amended, (75 Stat. 424, 22 U.S.C. 2151–2407). In discharging that responsibility, complainants use the services of the respondents.

Respondent North Atlantic/Mediterranean Freight Conference serves ports in the North Atlantic Hampton Roads/Eastport Range and ports in the Mediterranean, the Sea of Marmara, the Black Sea, and the Atlantic Coast of Morocco. It does not serve ports in Spain and Israel. Respondent Gulf/Mediterranean Ports Conference, serves ports in the South Atlantic/Gulf of Mexico Range, Cape Hatteras to Brownsville, and ports in the Mediterranean, including the Gulf of Taranto, the Adriatic Sea, the Black Sea, and the Atlantic Coast of Morocco to Port Said, inclusive. It does not serve ports in Spain.

Before proceeding to the facts such as they are, some clarification of the current status of the respondents and the issues in the case is necessary.

The North Atlantic/Mediterranean Freight Conference is no longer a party to the proceeding their motion to be dismissed as a party having been previously granted. At the hearing, complainants moved the dismissal of D. B. Turkish Cargo on the ground that they had examined the material furnished on discovery and had concluded that the surcharge of D. B. Turkish was reasonable and further proceedings against D. B. Turkish were unwarranted. Action on the motion was withheld pending decision on the motion for summary judgment and the motion is hereby granted.

Complainants' remaining allegations under 18(b)(5) have now become moot. Upon an earlier motion that part of the complaint which sought reparation under section 18(b)(5) was dismissed on the ground that until a rate has been declared unlawful by the Commission under section 18(b)(5) no reparation can be awarded on the basis of that rate. Insofar as the respondents not dismissed, the ruling left complainants free, however, to seek disapproval of the surcharge under 18(b)(5). As noted, this course has also become moot as the challenged surcharges were at the time of the hearing and are no longer in effect and any determination of their validity under section 18(b)(5) would be academic. See *Rates Hong Kong-United States Trade*, 11 F.M.C. 168 (1967). Accordingly, so much of the complaint as alleges violations of section 18(b)(5) is hereby dismissed. There remain then the asserted violations of sections 15, 16 and 17 of the Act.

Finally, complainants assert that Uiterwyk is in default for failure to answer the amended complaint and should be directed to pay the reparation requested. In view of the history of the attempted settle-

ment of the complaint by the Government and Uiterwyk, the prolonged and confused history of the case, and the disposition of the proceeding herein, it would be unfair to require Uiterwyk to pay reparation.

As best as they can be reconstructed from the case put in by the Government, the undisputed facts are as follows.

During the period in question, respondents imposed on Lebanese ports a war risk surcharge which ranged from 3 percent to 15 percent. According to complainants, the revenue generated by the surcharge greatly exceeded the respondents' costs. While a surcharge was imposed on shipments to Lebanese ports, none was imposed on shipments from Lebanese ports to U.S. ports.

During the period here in issue, respondents Lykes and the Gulf/Mediterranean Ports Conference did not impose any war risk surcharges on shipments to Israel despite the fact, according to complainants, that the cost of war risk insurance was higher to Israeli ports than to Lebanese ports. The only surcharges imposed by Lykes on shipments to Israeli ports were those assessed when Lykes vessels experienced prolonged delays in those ports.

No war risk surcharges were imposed by other carriers or conferences on shipments from the Great Lakes and Pacific Coast ports to Lebanon despite the alleged fact that voyages from those ports of origin experienced no less hazards and risks than vessels moving into Lebanese and Israeli waters from United States Gulf ports.

Complainants dispute the surcharge on some forty-five voyages by respondents Uiterwyk, Lykes and Hellenic from U. S. Gulf to Beirut, Lebanon.

DISCUSSION AND CONCLUSIONS

A good part of the Government's argument centers around what it conceives to be the paramount issue in this case, *i.e.*, whether a "surcharge" must reflect the actual cost of the added expenses incurred by carriers as a result of war or warlike conditions. This argument unfortunately is directed to the question of whether the surcharges are or were so high or so low as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5). This issue has already been dismissed as moot and the Government's argument that some level of surcharge still exists, albeit not necessarily the same level as before, will not resurrect it. Complainants would invalidate any war risk surcharge which did not exactly match the cost of the premiums for the war risk insurance. Obviously then, an entirely new set of facts is necessary before any decision can be made as to the

Government's theory as it applies to the current surcharges, if any, and whatever their level may be.

The Government would declare the surcharge unlawful under section 16 because:

> The collection of Lebanese war risk surcharges against complainants and other persons unreasonably prejudiced these persons through the payment of money for this item, since persons located in Beirut, Lebanon moving cargo to the United States, persons in Canada moving cargo to Beirut, persons in the United States Great Lakes moving cargo to Beirut, and persons in the United States West Coast moving cargo to Beirut were not burdened with the payment of monies for a Lebanese war risk surcharge.

Conversely, shippers from the Great Lakes, Canada, and the West Coast are unduly preferred by the Gulf to Beirut surcharge. At the same time and for much the same reason, the Government argues that the surcharge violates section 17.

To some extent, complainants misunderstand the law of preference, prejudice, and discrimination as it exists under the Shipping Act. To take first preference and prejudice under section 16, a competitive relationship is necessary in most cases. *North Atlantic Mediterranean Freight Conference—Rates on Household Goods,* 11 F.M.C. 202 (1967). In that case the Commission said:

> This prohibition against undue or unreasonable preference or prejudice is designed to deal with two or more competing shippers . . . receiving different treatment which is not justified by differences in competitive or transportation conditions. The classic case would be where shippers at A and B are competitive in a common market at C, the line hauls from A to B and C are the same and the same competitive influences apply to both . . . The section [16] is aimed at that favoritism by carriers which enables a shipper to reach a market and sell his goods therein at a lower rate than his competitors. . . . (Citations omitted.) (11 F.M.C. at 209/210)

By the admission of complainants' own witness, the shipment here in question did not move in competition for markets with any other shipments from any other areas. Thus the seemingly essential competitive relationship is missing.

The Government, however, challenges the need for competition citing the case of *Valley Evaporating Co. v. Grace Line Inc.,* 14 F.M.C. 16 (1970), in which the conference in revising its tariff inadvertently eliminated a commodity which under the conference's own criteria should have been retained. The inadvertence resulted in a higher rate to complainant. In finding a violation of section 16, the Commission found no competitive relationship was necessary. The retention of commodity rates was based upon a tonnage criteria—all commodities moving in excess of a stated number of tons were entitled to the retention of a commodity rate. Once the criteria was established, a simple mechanical or mathematical exercise

was all that was necessary to compile the list of commodity rates, and as the Commission said:

> At this point the single question involved was whether a given commodity moved in sufficient volume or not. Questions as to the characteristics inherent in the particular commodity involved were irrelevant as well as questions of whether the particular commodity competed with any other commodity. Thus as we stated in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547, (1966) the equality of treatment required in situations of this kind is "absolute and not conditioned on such things as competition." (14 F.M.C. at 22)

Thus as the Supreme Court said in *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 at 279, the Commission has often found violations of section 16 without a competitive relationship "in cases not involving freight rates and the particularized economics that result from a vessel's finite cargo capacity . . ." But is this such a case? In *Violations of Sections 14, 16, 17 of the Shipping Act—Nonassessment of Fuel Surcharges*, 15 F.M.C. 92 (1972), a case not cited by complainants, the Commission said at page 98, ". . . a surcharge is not geared to either transportation factors or the differing characteristics of commodities since it is imposed on each and every ton of cargo regardless of the commodity or length of voyage." As will be noted later, that case and this one are distinguishable on the nature of the surcharges involved. There is, moreover, a second factor which renders the case inapplicable.

In the *Fuel Surcharge* case, *supra*, it was found that the American flag carriers who transported U. S. military cargo had been assessing fuel surcharges on commercial cargo but not on their military carryings. Thus, while no competitive relationship was necessary, another element essential to a finding of preference or prejudice was present —the preference and prejudice stemmed from a common source. That is the same carriers moving the commercial cargoes were responsible for the alleged preference of failing to assess the fuel surcharges on military cargoes. This is yet another essential ingredient in finding unlawful preference or prejudice. As the Supreme Court said in *Texas & Pacific Railroad Co. v. U.S.*, 269 U.S. 627:

> . . . preference or prejudice can be found only by comparison of two rates. If these are the rates of one carrier to point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relationship. Assuming neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against both of them.

Complainants assert that on shipments made by them from U. S. Great Lakes and Pacific Coast ports to Beirut on conference and inde-

pendent carriers no war risk surcharges were imposed. Respondents point out that none of them are members of either the Great Lakes or Pacific Coast Conferences in question, and thus they could not be the common source of such alleged preference or prejudice.

As for shipment from Beirut to U. S. ports on which no surcharge was imposed, a somewhat different problem is posed. In the *Fuel Surcharge* case, *supra*, the Commission was dealing with an across-the-board uniform surcharge necessitated by the increased cost in bunker fuel. In such a case, the Commission found no "transportation factors" or "differing cargo characteristics" were inherent in the application of the surcharge. Thus, having found unequal application, there was, under the prevailing precedent, no need for anything more to establish the violation. A different situation exists here.

Although denominated a war risk surcharge (and indeed the element of risk played a part in the decision to impose the surcharge) port congestion was a large factor in the surcharge at Beirut. Sometimes, respondents had to make double calls at Beirut to effectuate delivery.

For example, a vessel would call as regularly scheduled at Beirut but due to congestion the vessel would be given a "number", the vessel would then call at other Mediterranean ports, returning at its newly appointed time for discharge. No comparable situation existed on the inbound leg of the voyage. An additional transportation factor was the need to maintain separate fleets for service to "Arab" ports and for service to Israeli ports. Both these factors involved additional expense.

My reading of the *Fuel Surcharge* case, *supra*, would not extend its rationale and holding on section 16 to the situation involved here. Transportation factors are indeed present here and because they are it seems to me that the Government must show something more than the absence of a surcharge on shipments from Beirut to U. S. ports—they must show a competitive relationship from which the failure to impose the surcharge has harmed them.

Finally, complainants assert on brief that "no war risk surcharge was assessed on cargoes shipped from U. S. Gulf ports to Israeli ports." However, the record clearly demonstrates complainants were aware that there was a surcharge to Israeli ports denominated simply as "Israeli surcharge." Apparently, complainants' point is that the surcharge was primarily for congestion and therefore could not have been a "war risk" surcharge. As already noted, one of the products of the "hostilities" was port congestion, as indeed respondents argue. In this case, the validity of the surcharge cannot depend on so slender a reed as its appellation. Moreover, by simply denominating it as a surcharge without any qualifier, the surcharge could be "war risk" as well as "congestion", neither, or both. That such transportation factors

as would take it out from under the *Fuel Surcharge* case, *supra,* are present here is obvious, and complainants have not demonstrated the requisite relationship to establish a violation of section 16.

For the foregoing reasons, complainants' allegation that respondents have violated section 16 is dismissed.

The Government, based on the same facts as they considered applicable to a violation of section 16, also charge respondents with a violation of section 17 of the Act. Complainants charge that because respondents did not impose a surcharge (1) from the Great Lakes and Canada to Beirut, (2) from the Pacific Coast to Beirut, (3) from Beirut to U.S. Gulf ports, and (4) from U.S. ports to Israeli ports, they have unjustly discriminated against complainants in violation of section 17.

In the *Household Goods* case, *supra,* the Commission held that in order for discrimination to exist under section 17 ". . . there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates." (11 F.M.C. 202 at 312) Patently in none of the asserted instances of discrimination can this situation be found. Accordingly, the alleged violation of section 17 is dismissed.

Finally, complainants charge a violation of section 15 of the Act. However, complainants' sole argument on this issue consists of the final statement in their brief that:

> In addition, complainants request that pursuant to section 15, the FMC cancel or modify the agreement filed by the Gulf/Mediterranean Ports Conference on the basis that it is contrary to the public interest and in violation of the Shipping Act.

If the agreement violates section 15, it is because of the surcharge imposed under it. Yet the surcharge in question has not been found to violate any provisions of the Shipping Act and complainants give not the slightest hint as to how the surcharge is contrary to the public interest. Accordingly, the charge is dismissed.

For the foregoing reasons, the motion for summary judgment is hereby granted, and the complaint is dismissed.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D. C.,
October 1, 1974.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 462

COMMODITY CREDIT CORP.

v.

DELTA STEAMSHIP LINES, INC.

Authority to waive collection of a portion of freight charges denied.

REPORT

Nov 6 1974

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn and Clarence Morse, *Commissioners*)

By application received June 4, 1974, Delta Steamship Lines, Inc. requested authority to waive collection of a portion of freight charges applicable to a shipment of Soyabean Oil shipped by Commodity Credit Corporation via Delta vessel from New Orleans to Puerto Cortes, Honduras. By letter of the same date the Commission informed Delta that its filing was improper in that Delta had not, as required by law, prior thereto filed a tariff containing the appropriate new rate. Delta resubmitted its application after appropriately amending its tariff. Thereafter, Chief Administrative Law Judge John E. Cograve issued his Initial Decision. Pursuant to Rule 13(g) of the Commission's Rules of Practice and Procedure, we determined to review that Initial Decision.

FACTS

Under Bill of Lading dated January 15, 1974, Delta transported 128.817 short tons of Soyabean Oil from New Orleans to Puerto Cortes, Honduras. For this transportation Delta had apparently quoted a rate of $32.00 per short ton, while the proper rate was $36.00 per short ton.[1] When the previously quoted $32.00 figure was brought

[1]Delta Steamship Lines, Inc. Tariff FMC #36, 1st revised page 94, effective November 27, 1973.

to Delta's attention, it agreed to change its tariff to conform to that quotation.

In an attempt to make its tariff rate conform to the quoted rate, Delta, on June 10, 1974, filed its correction No. 6, 2nd revised page 94 of Tariff FMC #38,[2] effective June 7, 1974. That correction quotes a rate on Soyabean Oil of $42.00 W/M with a note which provides: "Rate of $32.00 W/M on Soyabean Salad Oil will apply from June 7, 1974 thru July 7, 1974."

In his Initial Decision, the Administrative Law Judge granted Delta authority to waive collection of the difference between $32.00 per short ton and $36.00 per short ton, or $463.74.[3] This decision was premised on the conclusion that all the statutory and regulatory requirements prerequisite to such a grant had been met by Delta.

DISCUSSION

The applicable statutory and regulatory requirements are set forth in section 18(b)(3), Shipping Act, 1916, as implemented by the Commission's Rules contained in 46 CFR 502.92(a).

Section 18(b)(3) allows for refund or waiver of collection:

> . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the . . . carrier . . . has, prior to applying for authority to make refund, filed a new tariff . . . which sets forth the rate on which such refund or waiver would be based. . . .

Section 502.92(a) of the Commission's Rules parallels the language precisely.

In the case at hand, while it appears there were no other shipments of Soyabean Oil during the period which might otherwise have resulted in discrimination among shippers, it is not at all clear from the record or applicable tariffs that the remaining requirements of section 18(b)(3) have been met. In short, it does not appear from the record that there exists here any tariff error of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff which would warrant the relief requested.

Delta has explained that when the $36.00 rate actually charged was brought to Delta's attention, it agreed to modify its tariff to conform to the quoted rate. We do not believe this to be "an error in a tariff of a clerical or administrative nature" or "an error due to inadvertence in failing to file a new tariff." Rather, it appears that what is involved

[2]Effective April 4, 1974, rates from U.S. Gulf Ports to East Coast Ports of Honduras and British Honduras and inland points were transferred from Group II ports in Delta's FMC #36 tariff to a new FMC #38 tariff.

[3]The mathematics resulting in this figure appear to be in error. Due to our denial of this claim we only note such error but need not correct it.

here is an erroneous quotation of a rate, not an error in the tariff of a clerical or administrative nature or inadvertent failure to file an anticipated tariff.

On the basis of these determinations we conclude that the requested waiver of collection of the charges here is neither warranted nor statutorily within the authority of this Commission to grant.

The application for authority to waive collection of the charges here involved is hereby denied.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-6

HUGO ZANELLI d/b/a HUGO ZANELLI & CO.

ADOPTION OF INITIAL DECISION

Dec 12 1974

BY THE COMMISSION: (James V. Day, *Vice Chairman;* George H. Hearn and Clarence Morse, *Commissioners*)

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Norman D. Kline in which he concluded that Hugo Zanelli d/b/a Hugo Zanelli and Company (Zanelli), (1) was not independent within the meaning of sections 1 and 44 of the Shipping Act, 1916 (the Act), and (2) had violated specific sections of General Order 4 [1] by acting either as a purchaser or seller of certain shipments on behalf of a foreign consignee or as the agent of the consignee in so purchasing, and obtaining a beneficial interest in such shipments. However, because Zanelli "has cooperated fully with Hearing Counsel" and "the record does not indicate that respondent engaged in the aforementioned activities in willful violation of the law", the Judge recommended that Zanelli be allowed to retain his freight forwarding license on the condition that he cease and desist from the aforementioned unlawful act ivities, and submit to the Commission a report of compliance.

In its exceptions to the Initial Decision, to which Hearing Counsel have responded, Zanelli challenges:

1. . . . the legal conclusion that his having obtained a technical beneficial interest in the shipments discussed is in violation of Sections 1 and 44 of the Shipping Act, 1916, and regulations of the Commission thereunder because Respondent refrained from collecting compensation from any ocean carrier incident to such shipments.

2. . . . the consequent order to cease and desist from such activities, contending that his operations conform to the requirements of law.

[1] Sections 510.2(a), 510.9(d) and 510.21(1).

These exceptions, as Zanelli itself concedes, generally constitute a reargument of contentions already briefed by it and considered by the Administrative Law Judge. Upon thorough consideration of the entire record in this proceeding, we are of the opinion that Judge Kline's findings and conclusions with respect thereto were proper and well-founded and we adopt them as our own. However, and without disturbing any of these findings and conclusions, there are certain matters raised by Zanelli in its exceptions which, we believe, warrant some additional discussion.

Zanelli on exceptions argues that the Court of Appeals' decision in *Norman G. Jensen, Inc. v. F.M.C.*, ___ F.2d ___ (C.A. 8, 1974) "seems to lend more support to Respondent's contention [that his interest in shipments is permissible] than was accorded to it [in the Initial Decision]". We do not agree. On the contrary, we believe that the Initial Decision more than adequately points out the significant differences between Zanelli's activities here and those of ITC found permissible by the court in *Jensen*.

In *Jensen* the court determined that the so-called prohibited beneficial interest was "something more than that which ITC has . . . because ITC's relationship to the goods could not give rise to an indirect rebate." Seizing upon this language, Respondent contends that his interest in shipments is no less permissible since it collects no compensation from carriers. Respondent's interest in the shipments which it forwards differs materially from that of ITC considered by the court in *Jensen*. As Judge Kline found in his decision:

> . . . unlike Zanelli, ITC did not make purchases in its own name, advance its own funds on the purchases, or act as purchasing agent for consignees. ITC's functions, according to the Court, were those of a service enterprise which made transportation arrangements, prepared export declarations, received purchase orders and payments, etc. . . .
>
> Actually, even if Zanelli had not obtained a beneficial interest, the mere fact that he purchased the goods shipped or acted as agent of consignees in so purchasing would be enough to violate section 1 of the Act.

Thus, while ITC's activities failed to give ITC what the court characterized as the "right to the use and enjoyment" in the property, Zanelli's interest here may be properly described as a real ownership interest. On the basis of the foregoing, we can only conclude, as Hearing Counsel argued and Judge Kline found, that when one compares the services offered by Zanelli with those offered by ITC in *Jensen*, it becomes evident that the court's holding and rationale in the *Jensen* case has no application to this proceeding.

Another matter properly disposed of in the Initial Decision to which Respondent takes exception involves Judge Kline's reliance upon cer-

tain legislative history to show that Congress in enacting the forwarder legislation intended licensees to be *totally* independent of any shipper connections. On the theory that "the legislative history of prior unadopted bills is not germane to the bill ultimately adopted by Congress", Zanelli argues that Judge Kline, in expressing his opinion that the definition of independent ocean freight forwarder in section 1 of the Act does not allow for *any* shipper connection, improperly relied on the actions of the 85th Congress to support his interpretation of legislation enacted by the 87th Congress, i.e., P.L. 87–254. In support of this position, Respondent relies on *Interstate Natural Gas Co. v. FPC*, 156 F.2d 949 (5th Cir. 1952), and specifically that portion of the court's opinion where it is noted, albeit as dicta, that the legislative history of an unadopted version of the Natural Gas Act, the Lea Bill, offered as evidence of Congressional intent in enacting the final version, was irrelevant because "from the time the Lea Bill was introduced until the Natural Gas Act was passed, the ideas of the proponents of the legislation underwent considerable change."[2] 156 F.2d 952. Explaining that the Lea Bill was local in character in that it pertained to the production and individual sale of gas at the wells, while the Natural Gas Act related to the wholesale sales of gas in interstate commerce, the court concluded that: ". . . Legislative history cannot be referred to for the purpose of construing a statute contrary to the natural import of its terms . . .", adding that "if the language be clear, it is conclusive." *(Ibid).*

While the case cited by Respondent appears to have little, if any, relevance to this proceeding and to be easily distinguishable on the facts, the argument which it allegedly supports may be more quickly disposed of on other grounds. For whatever be the merits of Zanelli's contentions with regards to the use of certain legislative history, the fact remains, as the Presiding Officer found, that:

> . . . if the earlier history is excluded from consideration and consequently there is nothing to indicate Congressional intent, we are left with clear and unambiguous language in the statute which appears to require absolute independence.

There is one final exception raised by Respondent which, we believe, warrants specific rejection. Taking issue with the Initial Decision's finding that its "contended statutory construction will 'emasculate the Freight Forwarder law' ", Respondent argues that the Administrative Law Judge has failed to find any "evil" in its challenged forwarder activities. Contrasted is Judge Kline's construction of the

[2]Even assuming that this language is applicable to the present situation, we find considerable merit in Hearing Counsel's argument that the freight forwarder legislation *can* be used: ". . . to *illustrate* the change in the thinking of the legislators reflected by the progression from General Order 72, which permitted forwarders to carry on their business regardless of shipper control or connection, to P.L. 87–254, which required total independence."

law which Zanelli suggests "will result in oppression, hardship or inconvenience." This argument ignores the clear and specific findings of the Administrative Law Judge and constitutes an obvious "clutching at straws".

Judge Kline, on pages 20–21 of his Initial Decision, makes special effort to detail the ills of allowing Zanelli to operate under its "proposed alternative standard." The undesirable consequences which the Presiding Officer views as resulting from Zanelli's activities could not be more clearly spelled out. We therefore see no merit whatever in Respondent's assertion that "[N]owhere has . . . the Administrative Law Judge shown any evil in the activities of Zanelli."

Respondent's indictment of the consequences which allegedly flow from Judge Kline's "construction" of the freight forwarder legislation is equally without foundation. Zanelli's allegations of "injustice", "hardship", "oppression" and "inconvenience" are not only grossly exaggerated and completely unsupported, but more importantly are totally immaterial to the matter at issue. In this regard, we would remind Respondent that the requirements of the law may often impose certain "hardships" and "inconvenience" which are justified by the purpose to be served by the statute. Thus, accepting Zanelli's basic contention that its activities will somehow be adversely affected by our affirmance of Judge Kline's holding that it must be totally independent of shipper connection, we are nonetheless constrained to reject Respondent's argument as irrelevant. The law clearly requires that Respondent as a licensed ocean freight forwarder maintain, as Judge Kline correctly stated, certain "standards of fitness". That compliance with these standards *may* inconvenience Respondent or cause it to alter its operations may be regrettable but is not controlling.

On the basis of all of the foregoing, we are adopting the Initial Decision in this proceeding as our own. Thus, consistent with Judge Kline's findings and conclusions, we are allowing Zanelli to retain its license, in spite of certain found violations of the Act and Commission regulations promulgated thereunder, on the condition that Respondent cease and desist from the unlawful activities and promptly submit a report of the manner in which it has complied with this requirement.

Helen Delich Bentley, Chairman, and Ashton C. Barrett, Commissioner, dissenting:

Our only complaint with the majority's opinion is that it does not go far enough. While the majority found Zanelli guilty of various violations of the Act and Commission regulations promulgated pursuant

thereto, they nevertheless refused to revoke Zanelli's freight forwarding license. While this decision by the majority allowing Respondent to retain its license may be nobly motivated, it is nonetheless wholly inconsistent with the facts of record. Further, we believe that the majority's failure to take the action clearly dictated by those facts of record, i.e. revocation of Zanelli's license, compromises the Commission's regulatory responsibilities under the Act and frustrates the objectives of its own regulations.

Since the facts here are not in issue, we can only presume that the majority's failure to revoke Zanelli's license is occasioned by its inability to find the requisite "wilfullness" on the part of Zanelli.[3] In fact, however, Zanelli never disputed that he possesses a beneficial interest in goods financed by him. On the contrary, Zanelli openly admits his beneficial interest, defending his conduct on the grounds that the statute can be interpreted to allow a forwarder under certain circumstances, to have such an interest in shipments. Thus, that Zanelli clearly intended the results of its actions cannot be seriously questioned.[4]

Moreover, it is basic to the Commission's authority that a thorough examination of the circumstances surrounding violations must be conducted to determine if a licensee is still "fit, willing, and able" to be a licensed ocean freight forwarder. In view of Zanelli's activities, which, the majority themselves found were "unlawful", we question seriously whether Zanelli still maintains the presumed "fitness" required of a licensed ocean freight forwarder in view of its "unlawful activities". Weighing Zanelli's activities against the Commission's obligation to preserve the high degree of integrity incumbent upon a freight forwarder so that he may properly carry out his financial responsibilities for his shipper-clients, we believe that Zanelli has at least failed to exhibit the necessary business propriety required of a freight forwarder.

Finally, we believe that Zanelli's action draws into question its "ability" to continue in the forwarding business. A licensed forwarder is presumed to know and understand the law so that he does not run afoul of it. The record clearly demonstrates that Zanelli had knowledge of the law relevant to his prohibited activities, but instead chose

[3]On this point, we would remind the majority that it is firmly established that if one acts in contravention of a statute, even if done in good faith, he does so at a "substantial risk" and must face the consequences if proven wrong. *Consolo v. FMC*, 383 U.S. 607 (1966).

[4]The situation here can even be distinguished from the one under consideration in *Bolton & Mitchell*, 15 F.M.C. 248 (1972), another case where the majority allowed a forwarder to retain its license in spite of found violations of the Act and Commission rules. There the respondent at least not only proceeded on the assumption that his activities divested him of any beneficial interests in the financed goods, but moreover acted "upon advise of counsel". Here, Zanelli actively and blatantly pursues his financing well aware that it confers a beneficial interest in the goods forwarded.

to disregard it for his own purposes. We cannot excuse those unlawful activities where, as here, they represent a direct challenge to the Commission's established authority to regulate freight forwarders.

On the basis of the foregoing, we are of the opinion that the facts of record in this proceeding clearly dictate the revocation of Respondent's license.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-6

HUGO ZANELLI d/b/a HUGO ZANELLI & CO.

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine, *inter alia,* whether Hugo Zanelli d/b/a Hugo Zanelli and Co. (Zanelli) continues to qualify as an independent ocean freight forwarder and whether its license, No. 397, should be continued in effect, suspended, or revoked. The Commission has fully considered the matter and has this date made and entered of record an Adoption of Initial Decision, containing its findings and conclusions thereon; which Adoption is hereby referred to and made a part hereof. The Commission found that Zanelli did not possess the required independence from shipper connections necessary to be an ocean freight forwarder but, because of mitigating circumstances, declined to revoke Zanelli's license as an independent ocean freight forwarder, subjecting the retention of said license, however, to certain specific conditions.

Now therefore, it is ordered, That Zanelli be allowed to retain its license as an independent ocean freight forwarder subject to the following conditions:

1. Zanelli shall immediately cease and desist from all activities found to be violative of the Shipping Act, 1916, and certain specified Commission regulations or orders; and

2. Zanalli shall submit in the form of an affidavit a full report to the Commission on the manner in which it has complied with the requirements to cease and desist, as heretofore set out, within 90 days of service of this Order. If Zanelli should fail to submit the required report, its license as an independent ocean freight forwarder will be revoked without further proceedings.

It is further ordered, That to insure compliance with this Order, a complete examination of Zanelli's activities will be made within one

year from the date of service of this Order to determine whether Respondent is acting in keeping with our decision herein. By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74-6

HUGO ZANELLI d/b/a HUGO ZANELLI & CO.

Respondent, a licensed ocean freight forwarder, found to have acted as a purchaser and seller of certain shipments on behalf of Mexican consignees and to have obtained a beneficial interest in such shipments, in violation of sections 1 and 44 of the Shipping Act, 1916, and regulations of the Commission issued thereunder.

Respondent ordered to cease and desist from such activities and to conform his operations to the requirements of law, in lieu of revocation of his license.

Charles E. Orr for respondent.
Donald J. Brunner and *Marilynn J. Goldsmith,* Hearing Counsel.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was instituted by the Commission on February 4, 1974, in order to determine whether certain practices of respondent Hugo Zanelli d/b/a Hugo Zanelli and Company (Zanelli), an ocean freight forwarder holding FMC license No. 397, disqualify Zanelli as an independent ocean freight forwarder, constitute violations of sections 1 and 44 of the Shipping Act, 1916 (the Act), and sections 510.2(a) and 510.9(d) of the Commission's General Order 4, and thereby justify suspension or revocation of Zanelli's license.

The Commission's Order recites that information has been developed showing that Zanelli acts as a purchaser of material for export in the foreign commerce of the United States on behalf of certain Mexican consignees, advances its own funds and credit for such purchases, enjoys a profit by marking up its invoices as a fee for its purchasing services, all of which activities appear to violate the laws and regulations cited above.

Since the parties were not at issue over facts, the factual record in this proceeding was developed on the basis of a stipulated set of facts based in turn on analysis of numerous shipping documents which

[1] This decision became the decision of the Commission 12/12/74

illustrate Zanelli's method of operation, i.e., purchase orders, supplier invoices, Zanelli invoices, deposit slips, checks, forwarding invoices, bills of lading, export declarations, insurance forms, and port authority invoices. These stipulated facts are set forth below.

FINDINGS OF FACT

1. Hugo Zanelli d/b/a Hugo Zanelli & Co. (Zanelli) was issued independent ocean freight forwarder license FMC No. 397 on October 15, 1963.

2. In excess of fifty percent of the activities of Zanelli and his staff of two are devoted to freight forwarding.

3. Since May 1972, Zanelli has made purchases of material for export in the foreign commerce of the United States on behalf of Mexican principals (consignees) under the factual circumstances set forth below:

a. The principals request price quotations from Zanelli on needed merchandise, usually by telephone or telex from points in Mexico.

b. Zanelli ascertains the price of the merchandise from domestic suppliers and adds to it a mark-up (fee) for his time and expenses spent locating the merchandise, ascertaining the prices, and effecting the purchases. The amount of mark-up (fee) is determined by Zanelli.

c. Zanelli transmits to his principals, by telephone or telex, the purchase price he has ascertained plus mark-up (fee). The purchase price plus mark-up (fee) is expressed as one sum.

d. Upon receipt of Zanelli's price quotations plus mark-up (fee), the principals transmit purchase orders to Zanelli made out in his name.

e. Zanelli purchases the merchandise designated therein on credit in his own name.

f. In some instances Zanelli informs the suppliers that he is making the purchases for Mexican principals.

g. Upon notification that the purchased material is ready for shipment, Zanelli forwards same to his principals. He also transmits an invoice for the purchase price plus mark-up (fee).

h. In some instances Zanelli's principals forward payment for the merchandise prior to the time Zanelli makes payment to the supplier. In other instances, Zanelli advances his own funds in payment to the supplier. Zanelli charges neither interest nor finance fee for advancing his own funds.

i. Whether Zanelli is prepaid by his principals or advances his own funds, he pays the supplier with his own check drawn on an account set aside for this purpose.

j. Zanelli prepares a separate invoice for forwarding services performed in connection with each shipment.

4. Prior to commencing purchasing activities, Zanelli had for some time rendered freight forwarding services to the aforementioned principals.

5. No written memorandum of agreement has been executed by Zanelli and his principals.

6. Zanelli has collected no compensation from ocean carriers on any shipment where he has effected the purchases in the manner described in Item 3.

DISCUSSION AND CONCLUSIONS

The controversy in this proceeding centers on a difference of opinion between Hearing Counsel and respondent as to the degree of independence which a licensed freight forwarder must observe with respect to the shipments he dispatches. Zanelli contends that neither sections 1 and 44 of the Act nor the Commission's regulations promulgated in connection therewith are designed to prevent a licensed forwarder from forwarding shipments in which he has a beneficial interest so long as the forwarder abstains from receiving any compensation, i.e., brokerage, from an ocean carrier. Hearing Counsel, on the other hand, contend that the cited statutes and legislative history thereto and Commission decisions require the absolute independence of a licensed forwarder, forbidding him from forwarding any shipments in which he has a beneficial interest or from maintaining any relationship in which he is placed under the control of a shipper. Hearing Counsel contend, furthermore, that the record demonstrates that Zanelli has acted as a purchasing agent, seller, and financier of shipments he forwards and has obtained a beneficial interest in such shipments, that consequently Zanelli does not qualify as an independent ocean freight forwarder, and that he should be required to disengage himself from these activities.

Since Zanelli does not dispute in his briefs that he has acted in the manner described by Hearing Counsel, the issue for decision is one of law only, namely, whether a person may be both an independent ocean freight forwarder with respect to shipments in which he does not have a beneficial interest and a person dispatching shipments in which he has a beneficial interest, acts as purchasing agent, seller, financier, provided that he collects no brokerage on the latter shipments.

The pertinent statutes governing the matter of freight forwarder independence are sections 1 and 44 of the Shipping Act, 1916 (46 U.S.C. 801, 841b).

Section 1 of the Act defines an "independent ocean freight forwarder" as:

A person carrying on the business of forwarding for a consideration who is not a ***shipper*** or consignee or a ***seller*** or ***purchaser*** of shipments to foreign countries, nor has any ***beneficial interest*** therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest. 46 U.S.C. 801. (Emphasis added.)

Section 44(b) of the Act provides in pertinent part:

A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an ***independent ocean freight forwarder as defined in this Act*** and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder . . . 46 U.S.C. 841b. (Emphasis added.)

Section 44(d) of the Act authorizes the Commission to suspend or revoke a forwarder's license for "willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

The corresponding regulations promulgated by the Commission are contained in General Order 4, 46 CFR 510. Part 510.2(a) repeats the statutory definition of an "independent ocean freight forwarder" set forth in section 1 of the Act. Part 510(d) provides for revocation or suspension of a forwarder's license in the event of "change of circumstances whereby the licensee no longer qualifies as an independent ocean freight forwarder." Finally, Part 510.21(1) defines the term "beneficial interest" which Zanelli does not dispute as applying to Zanelli's activities in connection with shipments forwarded to certain Mexican consignees.[2]

Zanelli acknowledges that previous Commission decisions have insisted upon the absolute independence of licensed freight forwarders. In these cases, furthermore, the Commission has made clear that the mere existence of shipper connection or control, even if such control

[2]46 CFR 510.21(1) provides in pertinent part:

The term "Beneficial interest" for the purpose of these rules includes, but is not limited to, any lien interest in; right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising by financing of the shipment or by operation of law or by agreement, express or implied. . . .

In view of Zanelli's activities in which he makes purchases in his own name, uses his own funds, adds a markup to the supplier's price, etc., there is little doubt that he enjoys a "beneficial interest" in the shipments concerned.

In the recent decision of the Court of Appeals (8th Cir.) in *Norman G. Jensen, Inc. v. F.M.C.*, No. 73-1514, June 5, 1974, the Court held that an exporters' consulting firm known as ITC did not obtain a beneficial interest in goods shipped but, unlike Zanelli, ITC did not make purchases in its own name, advance its own funds on the purchases, or act as purchasing agent for consignees. ITC's functions, according to the Court, were those of a service enterprise which made transportation arrangements, prepared export declarations, received purchase orders and payments, etc. Slip opinion, pp. 2,3. See also *Norman G. Jensen, Inc.*, 16 F.M.C. 365 (1973), reversed by the Court, for a fuller factual description of the activities of ITC.

Actually, even if Zanelli had not obtained a beneficial interest, the mere fact that he purchased the goods shipped or acted as agent of consignees in so purchasing would be enough to violate section 1 of the Act.

is never exercised, is enough to disqualify the licensee. In *License No. 790—North American Van Lines,* 14 F.M.C. 215 (1971), the Commission revoked the license of a forwarder merely because a holding company (PepsiCo, Inc.) owning companies engaged in exporting had purchased the stock of the forwarder. Even though the licensee never forwarded or agreed never to forward shipments for its parent or affiliated corporations, the Commission held that the forwarder did not possess the requisite independence, since the mere possibility of control, even if never exercised, was forbidden by the statute. In this regard, the Commission stated (14 F.M.C. at page 221):

> All of the legislative history points out clearly that exceptions to the clear and unambiguous language of the statute were to be excluded and that the inherent prohibition vis-a-vis control is absolute and we have so held in numerous proceedings. (See: *Application for Freight Forwarding License-Louis Applebaum,* 8 FMC 306 (1964); *Application for Freight Forwarding License-Wm. V. Cady,* 8 FMC 352 (1964); *Application for Freight Forwarding License-Del Mar Shipping Corp.,* 8 FMC 493 (1965); *Application for Freight Forwarding License-York Shipping Corp.,* 9 FMC 72 (1965).[3]

Although Zanelli does not dispute that the Commission has required absolute independence in previous cases, he urges the Commission to reconsider these decisions in the light of the legislative history to section 44 of the Act and contends that the services which he is providing benefit and promote the commerce of the United States. Zanelli contends also that the Commission's insistence upon absolute independence exceeds the congressional purposes in enacting section 44, which he contends was enacted, firstly, in order to prevent indirect freight rebates to shippers and, secondly, to regulate the forwarding industry to prevent sharp practices. As Zanelli views the situation, if a licensee abstains from collecting brokerage from ocean carriers on those shipments in which he has obtained a beneficial interest or, presumably, acts as purchasing agent or financier, the congressional purposes are thereby subserved. The Commission, of course, has specifically rejected such a contention (See *Cady,* cited above, at page 360) and neither the language of the applicable statutes nor their legislative history lend it support.

At the very outset Zanelli is faced with the fact that the applicable statutes are unambiguous in their language. Section 44(b) of the Act, quoted above, unequivocally requires that a licensee be "an independent ocean freight forwarder as defined in this Act." Section 1 of the Act unequivocally defines "independent ocean freight forwarder" as

[3]Significantly the *North American Van Lines* case involved a shipper and forwarder who were separate corporate entities, although affiliated. In the present case Zanelli's claims to compliance with the statutory requirements are made more difficult to sustain by the fact that he is one person operating as licensee and as purchasing agent, financier, etc., with respect to certain shipments.

a person "who is not a shipper or consignee or a seller or purchaser of shipments . . . nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper, consignee, etc." It is undisputed that Zanelli acts as a purchasing agent for certain Mexican consignees, purchases shipments, has obtained a beneficial interest, etc. Therefore, it would appear that no further inquiry as to the legislative history underlying the clear language of the statute is necessary. It is a familiar doctrine in law that resort to legislative history is unnecessary if a statute is clear and unambiguous. *Sea-Land Service, Inc. v. F.M.C.*, 404 F. 2d 824 (D.C. 1968); *North American Van Lines*, cited above, at page 220; *Caminetti v. United States*, 242 U.S. 470, 485 (1916).[4] Nevertheless, since Zanelli contends that the Commission's previous decisions exceeded congressional intentions, an examination of legislative history is warranted.

The immediate stimulus to the enactment of the Freight Forwarder Law, Public Law 87–254, was the decision of the Federal Maritime Board in *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders*, 6 F.M.B. 327 (1961). In that decision the Board found that a variety of malpractices had become widespread in the freight forwarding industry, including indirect rebating to shippers in connection with brokerage payments by ocean carriers, improprieties in billing methods, discrimination, preference, and prejudice in the assessment of forwarder charges, etc. For several years, congressional committees had also been probing into freight forwarding practices and there had been numerous prior agency and court cases involving forwarder practices and compensation. *Dixie Forwarding Co., Inc. Application for License*, 8 F.M.C. 109, 117 (1964); *New York Foreign Freight Forwarders & Brokers Association v. Federal Maritime Commission*, 337 F. 2d 289, 293 (2d Cir. 1964).

As a result of its investigation, the Board revised its earlier forwarder regulations dating from 1950 and promulgated new regulations as General Order 72 Revised, which among other things, would have absolutely prohibited the payment of brokerage. The rules were to become effective 120 days after publication in the Federal Register. 6 F.M.B. at page 327. Faced with what the forwarding industry described as a substantial loss of revenue because of the proposed ban on brokerage, the forwarders appealed to Congress for the enactment of legislation which would permit such payments under appropriate safeguards. The ultimate result was Public Law 87–254. Instead of a total ban on brokerage as the Board has proposed, Congress decided

[4]As the Court stated in *Sea-Land Service, Inc. v. F.M.C.*, cited above:
Ordinarily, where the language of a statute is clear and unambiguous on its face, the thrust of that language should not be controverted by seeking to show an inconsistent legislative intent.

to permit compensation from carriers, i.e., brokerage, but only where the forwarder rendered specified services of value and remained independent, i.e., free of any affiliation with a shipper, consignee, seller, purchaser of the shipment, or with any person having a beneficial interest in the goods shipped, in order to eliminate indirect rebates to shippers. *New York Foreign Freight Forwarders & Brokers Association v. Federal Maritime Commission,* cited above, at p. 293. Additionally forwarders would be licensed and other safeguards provided to enable the Commission to cure the abuses and undesirable practices uncovered in its extensive investigations. *Id,* at p. 293; *Dixie Forwarding Co., Inc. Application for License,* cited above, at pp. 117, 118.

It is important to bear in mind that Public Law 87–254 was not enacted solely to eliminate indirect rebating but other malpractices as well and that Congress was also concerned over the need to establish and maintain standards of fitness consistent with the fiduciary nature of the forwarder's business. In this regard the Commission has stated:

> As the House Committee on Merchant Marine and Fisheries pointed out: "The intention of the . . . licensing provision [section 44] is to have every person, firm or corporation who holds himself out as a forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates." *Dixie Forwarding Co., Inc.,* cited above, at page 118.[3]
>
> An important matter to be considered in determining an applicant's fitness is the fact that the prospective licensee will be a fiduciary for clients and, in addition, will occupy a unique position of trust in dealing with the carriers and the public. Hence, it must appear that, as licensee, applicant will maintain a standard of professional conduct reflecting the highest degree of business responsibility and integrity, not only with clients but also with carriers and with the public. *License Application-Guy G. Sorrentino,* 15 F.M.C. 127, 134 (1972).

The above discussion provides a general framework within which one can evaluate Zanelli's contentions.

Zanelli disputes the Commission's holding in *North American Van Lines,* cited above, that "[a]ll of the legislative history points out clearly that exceptions to the clear and unambiguous language of the statute were to be excluded and that the inherent prohibition vis-a-vis control is absolute. . . ." Furthermore, Zanelli disagrees that the Court in *New York Freight Forwarders, etc.,* cited above, intended to hold that licensed forwarders may never advance funds, have a beneficial interest in goods shipped, or be shipper-connected when in this regard the Court stated:

[3]See House Report No. 1096, 87th Cong., 1st Sess., p. 3. In *Norman G. Jensen, Inc. v. F.M.C.,* cited above, the Court appears to disagree with the above discussion concerning the fact that the purposes of Public Law 87–254 were not limited merely to the prevention of indirect rebating. In a footnote to its decision the Court states that Congress did not intend to establish a fiduciary relationship (footnote 3, p. 5). The Court appears to have disregarded the remarks of the House Committee to the contrary.

Licensed forwarders must be truly independent of shippers and not have any beneficial interst in shipments in order to prevent the illegal rebating that occurs when brokerage is received by forwarders who are also shippers, shipper-owned or shipper-connected, or have a beneficial interest in shipments. . . . Congress by its legislation . . . showed a clear intention to separate forwarders from all shipper interests. . . . 337 F. 2d at page 296.

In affirming the Commission's regulation defining "beneficial interest" so as to prohibit licensed forwarders from acquiring an interest through financing or by the right to use, enjoy, profit, benefit, or receive any advantage, etc. (46 CFR 510.21(l)), furthermore, the Court stated:

Although the challenged rule may limit some benign financing activities by forwarders, it provides a means to curb an evil Congress sought to correct—the collection of compensation from carriers by persons who have any interest in the goods being shipped. We hold that the rule is reasonable and necessary to prevent forwarders from selling goods under the guise of "financing" and then using this subterfuge to receive a discounted freight rate. 337 F. 2d at p. 297.

The Commission, of course, has applied the law and regulations so as to prohibit licensed forwarders from "financing." See, e.g., *Bolton and Mitchell, Inc.—Independent Ocean Freight Forwarder License No. 516*, 15 F.M.C. 248 (1972); 16 F.M.C. 284 (1973); Supplemental Report, November 8, 1973; Second Supplemental Report, May 23, 1974; *New York Foreign Freight Forwarders & Brokers Association v. F.M.C.*, cited above, at p. 297. Zanelli contends, however, that the Court only intended to carry out the congressional purpose in terminating illegal rebating when shipper-connected forwarders received brokerage from carriers, not to abolish all beneficial interests or financing activities of forwarders who abstain from collecting brokerage on the shipments involved. Similarly, Zanelli contends that the Commission has misread the legislative history and that its decisions requiring absolute independence, which Zanelli points out were not appealed to the Courts, are consequently erroneous.[6]

As shown above, Public Law 87-254 abolished a remedy proposed by the Commission's predecessor in General Order 72 Revised, namely, a total ban on brokerage and permitted instead the payment of brokerage but required independent forwarders, i.e., forwarders free of shipper control, having no beneficial interest, engaging in no purchasing activities, etc. General Order 72 Revised had permitted forwarders to carry on their businesses regardless of shipper connection or control. Indeed, the regulation specifically permitted forward-

[6]After respondent's briefs were filed, one Commission decision was reversed by the Courts in *Norman G. Jensen, Inc. v. F.M.C.*, cited above. The Court held that an exporting consultant firm with which the forwarder concerned was connected had not obtained a beneficial interest in the goods shipped. As noted above, however, the consulting firm's method of operating differed in several key respects from Zanelli's.

ers to be such persons as "common carriers, manufacturers, exporters, export traders, manufacturers' agents, resident buyers, brokers, commission merchants. . . ." 46 CFR 244.1, 6 F.M.B. at page 368. Instead of this permissive system, Congress established a standard of total independence. Zanelli contends, however, that something less than total independence was also intended to be permitted, a status which one could characterize as qualified independence, wherein forwarders could operate under shipper control provided that they abstained from receiving brokerage from carriers.

As shown above, the language of Public Law 87–254 nowhere suggests that the forwarders' independence could be so qualified. But if resort to legislative history is necessary, as Zanelli would have it, in order to support a finding that the clear language of the statute means something else, that the Commission's decisions requiring absolute independence are erroneous, and that the Court's statements in the *New York Freight Forwarders and Brokers Association* case regarding Congress's "clear intention to separate forwarders from all shipper interests" must likewise be qualified, there should be some clear and convincing evidence that Congress meant to permit such a qualified independence. The legislative history, however, provides no such evidence and, if anything, confirms the Commission's and the Court's views.

In the *North American Van Lines* case, cited above, the Commission cited pertinent legislative history regarding the standard of independence mandated by Congress. The Commission cited, for example, H.R. Report No. 2333, 85th Cong., 2d Sess., respecting a previous Bill, H.R. 8382, in which "independent ocean freight forwarder" was first defined in terms virtually identical to the definition contained in Public Law 87–254.[7] The report stated:

> This would make it clear that *all* shippers, consignees, sellers, purchasers, and carriers of ocean export cargoes are to be prohibited from obtaining a license regardless of whether these groups forward only their own cargoes or the cargoes of others. (Emphasis supplied.) 14 F.M.C. at page 221.

The earlier definition, as Hearing Counsel point out, was changed slightly but in a way which made it even more clear that Congress desired total independence. Thus, the earlier definition contained the phrase, "in connection with shipments dispatched by such forwarder," which implied that forwarders need be free of shipper con-

[7]This definition stated as follows:
An independent foreign freight forwarder is a foreign freight forwarder who in connection with shipments dispatched by such forwarder is not a shipper or consignor or seller or purchaser or common carrier by water of such shipments nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by the shipper or consignor, common carrier by water or by any person having a beneficial interest in such shipments. 14 F.M.C. at p. 220.

trol only on shipments dispatched by such forwarder. Theoretically, therefore, a forwarder could remain a shipper or maintain a beneficial interest in shipments so long as he did not himself perform the forwarding services on such shipments, i.e., the forwarder could carry on a mixed business, sometimes acting as shipper, sometimes as forwarder. However, deletion of the phrase in question from Public Law 87–254 can only indicate an intention to eliminate such a hybrid situation. Zanelli contends, however, that the above deletion was made by an earlier Congress, the 86th, not the Congress which actually enacted Public Law 87–254. Zanelli states that "[t]here is nothing to show that the 87th Congress gave the matter any consideration one way or the other." Zanelli cites no authority for the proposition that the work of Congresses immediately preceding the Congress which enacts legislation involving the same or related matters must be disregarded in ascertaining congressional intent as to the legislation ultimately enacted. But even if this is a proper doctrine, it lends Zanelli's contentions no support for if the earlier history is excluded from consideration and consequently there is nothing to indicate congressional intent, we are left with clear and unambiguous language in the statute which appears to require absolute independence. As the Court stated in *Alaska Steamship Co. v. FMC*, 399 F. 2d 623, 626, footnote 2 (9th Cir. 1968), in connection with the interpretation of clear statutory language:

> The legislative history of the provisions in question, on which all parties to this dispute rely, is inconclusive. . . . In the absence of a definitive explanation of congressional intent in dealing with this problem, this court will not assume that Congress intended to use the terms "through routes" and "joint rates" other than in accord with their settled meaning of more than 50 years duration.[8]

Even if we ignore the actions of previous Congresses and accept Zanelli's basic contention that Congress was focussing on the indirect rebating problem when it enacted Public Law 87–454, this still does not mean that Congress intended to authorize the type of forwarder operation that Zanelli is proposing, in which a forwarder is sometimes independent, sometimes not, with abstention from brokerage in the latter cases. Zanelli seems to be inferring that because the legislative history contains no indication that Congress considered such a hybrid operation, there was no intent to prohibit it, despite the clear language of the law ultimately enacted which granted no exceptions. Without a positive indication of congressional intent to grant such an exception, however, the statute cannot be so interpreted. *Alaska Steamship Co. v. F.M.C., Sea-Land Service, Inc. v. F.M.C.*, cited above.[9]

[8] See also *Sea-Land Service, Inc. v. FMC*, cited above, for a similar holding.

[9] These cited cases are especially illustrative. They involved a controversy between the Federal Maritime Commis-

Finally, regarding the language of the statute, Zanelli makes two arguments to support his contention that a person carrying on the business of forwarding may sometimes be allowed to have a beneficial interest in shipments. Firstly, Zanelli contends that section 44(a), which states that a "person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license," implies that an occasional seller may hold a forwarder's license. As Hearing Counsel point out, however, the purpose of the quoted language was not to allow a licensee to be a shipper but to permit a shipper, whose business is not forwarding, to dispatch his own shipments without having to obtain a license.[10] Secondly, Zanelli contends that section 44(e) of the Act can be read to permit a forwarder to dispatch shipments in which he has a beneficial interest, so long as he abstains from collecting brokerage. This is so, argues Zanelli, because that statute provides that a common carrier by water may compensate a forwarder "in connection with any shipment dispatched on behalf of others."[11] Therefore, Zanelli infers, for his own shipments, i.e., those in which the forwarder has a beneficial interest, the forwarder need only abstain from such compensation if he wishes to dispatch the shipments. Such a reading, as Hearing Counsel point out, would emasculate the Freight Forwarder Law which, as shown above, defined "independent ocean freight forwarder" in section 1 of the Act as a person devoid of any beneficial interest in the shipments he forwards without qualification. Under recognized principles of statutory construction, section 44(e) should not be read so as to repeal section 1 by implication or to reach plainly inconsistent results. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

It should be evident from the above discussion that Zanelli is proposing an alternative remedy which was not the one selected by Congress, namely, qualified independence based upon abstention from brokerage in shipper-connected instances. Although neither the legis-

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sion and two carriers as to the meaning of Public Law 87-595 which provided that all through route and joint-rate arrangements between F.M.C.—regulated water carriers and I.C.C.—regulated motor carriers would fall under the jurisdiction of the I.C.C. The F.M.C. had held, despite clear statutory language, that certain arrangements which involved water carrier service with incidental motor carrier pickup and delivery did not fall under that law since the legislative history indicated that the genesis of the law related to a problem involving long line-haul, not incidental, motor carriage. *Sea-Land Service, Inc.—Cancellation of Rates*, 11 F.M.C. 137, 142, 143 (1967); *Alaska Steamship Co.—Cancellation of Rates*, 11 F.M.C. 314 (1968). The Courts, however, reversed the Commission and refused to carve out an exception to the clear statutory language so as to restrict its application to the type of problem which had precipitated the legislation.

[10]Hearing Before the Merchant Marine and Fisheries Subcommittee of the Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., February 29, 1960, p. 49.

[11]The text of section 44(e) states in pertinent part:

A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others. . . .

lative history nor the clear language of the law shows any intention on the part of Congress to permit such a standard for forwarders, Zanelli contends that no harm results if a forwarder operates under such a standard and that, on the contrary, the commerce of the United States is benefited because Zanelli assists in promoting exports by acting as purchasing agent for foreign consignees, advancing funds, financing exports, etc. The contention ignores several considerations, however.

As a matter of law, if an activity is prohibited, good intentions or beneficial results are irrelevant. Thus, if a group of companies agree to fix prices with good motives, e.g., in order to stabilize an industry or help revive a depressed economy, the activity is still unlawful. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Similarly, as the Court recognized in *New York Freight Forwarders and Brokers Association*, cited above at p. 297, Public Law 87–254 and the Commission's regulation prohibiting licensed forwarders from having a beneficial interest in shipments admittedly resulted in the termination of some "benign" financing, yet such activities were found to be prohibited nonetheless. If the statute is the product of unwise legislation, because of the failure to consider the desires of some forwarders to engage in "benign" financing or act as helpful purchasing agents, however, the proper avenue of relief is to seek amendment of the legislation which can only be accomplished by the Congress, not by this Commission.[12]

A second consideration which Zanelli's argument ignores is the fact, as discussed previously, that Congress was interested not only in preventing indirect rebating to dummy forwarders but in establishing standards of fitness to insure that forwarders would act in a manner consistent with their fiduciary relationship to shippers. By establishing total independence from shippers, Congress not only stamped out indirect rebating but assured that forwarders would serve their shipper clients as disinterested fiduciaries, not as competitors. If Zanelli's proposed alternative standard is permitted, a forwarder would be allowed to dispatch not only the goods of outside shippers but of shipments in which he is either the shipper or shipper's agent and consequently may be in a position of actually competing with his shipper clients. Can an outside shipper client be assured that such a

[12]The legislative history to Public Law 87–254 indicates that some spokesmen for the law recognized that its enactment was somewhat hasty because of the forwarding industry's entreaties for prompt relief from the Board's proposal to ban brokerage. See statements of Senator Yarborough and Keating, Congr. Record, 87th Cong., 1st sess., pp. 17999–18000, 18240–241. Upon signing the Bill into law, President Kennedy also remarked in pertinent part:

> If experience should show, however, that this legislation is inadequate either to deal with the abuses or to provide necessary assistance to the shippers and carriers, I intend to recommend further remedial legislation. Statement of the President on S. 1368, signed into law as Public Law 87–254, September 19, 1961.

forwarder would accord the shipper the same care in arranging for the exportation of that shipper's goods as the forwarder would be doing with respect to the forwarder's own shipments? In all fairness to Zanelli, the record in this proceeding contains no indication that he has shown any preference to those shipments which he purchased or in which he enjoyed a beneficial interest. However, by permitting a forwarder to act in a dual capacity, i.e., as a shipper as well as forwarder, the potential for abuse is established. Furthermore, if the forwarder happens to be exporting the same type of merchandise as one of his outside shipper clients, the forwarder could conceivably have an advantage if he has access, as a forwarder, to confidential information relating to his competitor's business. Is it not more prudent to establish total independence for the forwarder instead of permitting a system whereby he may be called upon to choose between his own interests and those of his client?[13]

Finally, as the Court in *Norman G. Jensen, Inc. v. F.M.C.*, cited above, indicated, it is possible for a forwarder to assist exporters and promote the foreign commerce of the United States without acquiring a beneficial interest in goods shipped and thereby losing independence. In that case, the forwarder's connection with a firm engaged in counselling and assisting exporters was found to be lawful but significantly the firm in question was not a purchaser or seller of the goods exported.

ULTIMATE CONCLUSIONS

The plain language of the Freight Forwarder Law, Public Law 87–254, its legislative history, and all previous Commission cases on the subject indicate that the standard of independence imposed on persons wishing to hold freight forwarder licenses in absolute and that a freight forwarder cannot hold such a license if he at any time acts as shipper, agent for a consignee, seller, financier, or has obtained a beneficial interest in the goods shipped. The proposal suggested by Zanelli, namely, that qualified independence is permitted whereby the forwarder may act in the foregoing manner so long as he abstains from the collection of brokerage is an alternative not permitted by the law nor does such a proposal derive support from the legislative history.

If, as Zanelli argues, the commerce of the United States would ultimately benefit if forwarders could sometimes act like shippers or

[13]Without commenting on the truth of the allegations, the presiding judge officially notices that a complaint has been filed in Docket No. 73–70, *Inter Equip, Inc. v. Hugo Zanelli & Company*, in which complainant alleges that Zanelli has acted as a competing seller while forwarding complainant's goods and further alleging harm resulting from such activity.

obtain beneficial interests in goods exported, the proper avenue of relief is to ask Congress to amend the law. However, the present requirement that forwarders maintain absolute independence is fully consistent with the congressional intent not only to stamp out indirect rebating but to insure that forwarders would serve their shipper clients in a manner consistent with their fiduciary relationships without preference or discrimination. A standard of absolute independence is more consistent with such a purpose than one of qualified independence wherein a forwarder engaging in buying and selling may be placed in the position of competing with his own shipper clients.

Finally, as a recent court decision indicates, under certain conditions, forwarders may engage in counselling and assisting exporters without becoming purchasers, sellers, or otherwise obtaining beneficial interests in the goods shipped, thereby promoting the commerce of the United States without simultaneously losing independence.

Accordingly, it is found and concluded that the activities of respondent Zanelli as a purchaser and seller of certain shipments on behalf of Mexican consignees, in which he also obtained a beneficial interest, disqualified Zanelli as an independent ocean freight forwarder, and constituted violations of sections 1 and 44 of the Shipping Act, 1916, as well as sections 510.2(a), 510.9(d), and 510.21(1) of the Commission's General Order 4.

Since respondent has cooperated fully with Hearing Counsel and the record does not indicate that respondent engaged in the aforesaid activities in willful violation of law, an opportunity for voluntary compliance should be afforded as an alternative to suspension or revocation of respondent's license. *Del Mar Shipping Corp.*, cited above, at p. 497; *Bolton and Mitchell, Inc.*, cited above. In this regard the recent decision of the Court of Appeals in *Norman G. Jensen, Inc. v. F.M.C.*, cited above, may provide guidance as to the means by which respondent can modify his method of operating so as to conform to the requirements of law. Therefore, if respondent wishes to retain his forwarder's license, he shall cease and desist from the aforesaid activities found to be unlawful and shall submit a full report promptly to the Commission on the manner in which he has complied with this requirement.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D. C.,
June 12, 1974.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-53

LEVATINO & SONS, INC.

v.

PRUDENTIAL-GRACE LINES, INC.

PARTIAL ADOPTION OF INITIAL DECISION AND ORDER ON REMAND

Dec 16 1974

This proceeding was initiated by the filing of a complaint on December 29, 1970, in which Complainant Levatino & Sons, Inc. (Levatino) alleged that Respondent Prudential-Grace Lines, Inc. (Grace), during the years 1966, 1967, and 1968, violated sections 14 Fourth, 16 First, and 17 of the Shipping Act, 1916 (the Act), by failing to provide Levatino with space accommodation for cargoes which Grace had previously contracted to carry; by unfairly and unjustly discriminating against Levatino and unduly and unreasonably preferring competitors of Levatino with regard to the furnishing of warehousing and fumigation facilities; and by entering into settlements with competitors of Levatino in satisfaction of complaints filed with the Federal Maritime Commission by such competitors.

On September 12, 1969, Levatino had commenced an action against Grace in the United States District Court for the Southern District of New York seeking compensatory damages in the sum of $3,765,000, alleging substantially the same violations of the Act, as well as violations of the common law of the State of New York. *Levatino & Sons, Inc. v. Grace Line, Inc.*, 69 Civ. 3983 (S.D.N.Y., 1969). In response to a motion to dismiss filed by Grace, the Court, by order dated August 25, 1970, stayed the action:

> . . . subject to further order of the Court, pending referral by plaintiff LEVATINO & SONS, INC. to the Federal Maritime Commission of the claims alleged in the complaint herein which are or may be within the said Commission's jurisdiction and the final disposition of any proceeding initiated by said plaintiff before said Commission. . . .

In accordance with the Court's directive, Levatino filed its complaint with the Commission. Upon motion of Respondent, however, that portion of the complaint relating to the issue of reparation was dismissed by the Commission, it appearing that the complaint was filed more than two years subsequent to accrual of the cause of action.

Administrative Law Judge Norman D. Kline issued his Initial Decision.[1] In that Initial Decision, Judge Kline found specifically that Respondent had not violated the Act with regard to the furnishing of warehouse and fumigation facilities to Complainant or with respect to entering into settlement agreements with competitors of Complainant in satisfaction of complaints before this Commission. As to the alleged violations of sections 14 Fourth and 16 First regarding the shutting out of Complainant's cargoes, Judge Kline found that while there was no showing of unjust discrimination or undue preference against Complainant by Respondent, Respondent had not conducted itself in the manner in which it was obligated to act as a common carrier by water and by a general course of conduct had treated all similarly situated shippers in an unfair manner. Judge Kline therefore concluded that Respondent had violated sections 14 and 16 of the Act by generally failing to meet the standards of conduct imposed upon a common carrier under the Act. Following issuance of this decision, both Complainant and Respondent filed exceptions to Judge Kline's Initial Decision.

Complainant Levatino excepted to Judge Kline's findings that:

1. The violations of sections 14 Fourth and 16 First by Respondent do not center on discrimination against Levatino but were random and affected numerous shippers other than Levatino;

2. Unfair treatment of Levatino in the matter of space accommodations was limited to the period January-March 1967;

3. Levatino received terminal services and facilities which did not differ significantly from those enjoyed by other importers who used Grace's sheds in Port Newark;

4. Grace did not subject Levatino to undue or unreasonable prejudice or disadvantage or unjust discrimination in the furnishing of terminal and fumigation facilities in 1966 and 1967;

5. Grace did not enter into any agreements with warehouse companies during the 1966–1967 season which were required to be filed with the Commission pursuant to section 15 of the Act; and

6. Grace's settlement in the "All-Chilean" case did not constitute rebating or the use of an unjust or unfair device or means to allow shippers to obtain transportation at lower than regular rates in violation of sections 16 or 17 of the Act.

[1]That Initial Decision is appended hereto and made a part hereof.

Levatino lodged six further exceptions which are alleged failures to make certain findings—the converse of the six exceptions cited above. With the exception of the issue raised as to shutout cargoes (#1 & 2 above), we will discuss each of these exceptions hereinafter, and our conclusions as to each, *seriatim*.[2] Exceptions 1 and 2 dealing with the issue of shutouts will be discussed separately thereafter.

Levatino Exceptions 3 & 4. It is alleged that Judge Kline erred in finding that Grace had not discriminated against Levatino with respect to the terminal and fumigation facilities provided by Grace to Levatino and others. In support of its position, Levatino argues that Judge Kline ignored the weight of the evidence before him in reaching his conclusion, citing transcript references and various exhibits. We have reviewed Judge Kline's numerous findings of fact in regard to these alleged errors and the transcripts and exhibits on which they were based. We are unable to conclude from this scrutiny that Judge Kline could not come to the conclusions that he did based on that record. While Levatino may disagree with these findings, we have been shown nothing which would indicate that Judge Kline erred with respect to these findings. The thoroughness of Judge Kline's consideration may be seen in the lengthy findings of fact on pages 6 through 15 and his discussion on pages 25 through 28 of the Initial Decision. We conclude that Judge Kline's findings in this regard are fully supportable on the record and we therefore adopt them as our own.

Levatino Exception 5. It is alleged Judge Kline erred in finding that certain warehouse agreements entered into by Grace were not subject to section 15 of the Act and that therefore Grace's failure to file such agreements with the Commission was not a violation of the Act. Levatino has little to say in support of this claim. In sum, Levatino merely states that such an agreement between Levatino and Grace was not filed and that "through Grace's inducement, cajoling and misrepresentation Levatino signed a written agreement which did not reflect the actual oral agreement between the parties. . . ." We do not view this argument as support in any way of Levatino's claim regarding whether or not such an agreement may be subject to section 15. Nonetheless, in order to afford Levatino's claim in this exception the appropriate attention, we have carefully reviewed the record and the Initial Decision. We are not persuaded that Judge Kline erred in finding the alleged agreement not to be subject to section 15 and its filing requirements. We are of the opinion that Judge Kline's lengthy discussion of this issue (pages 29 through 34) in the Initial Decision is

[2]Conclusions of Complainant in support of its exceptions and specific allegations of these exceptions not explicitly discussed herein have been scrutinized and found to be of insufficient merit to warrant treatment here.

satisfactory as a matter of law as to the situation presented in this case. We have not been persuaded differently by the conclusory, but unsupported, statements of Complainant's exceptions.

Levatino Exception 6. It is here alleged that Judge Kline erred in finding that Grace's settlement in the All-Chilean case did not constitute rebating or the use of unjust or unfair devices to allow shippers to obtain transportation at rates below regular rates. To support its contention, Levatino again urges that Judge Kline ignores the weight of the credible evidence. Again, we turn to the reasoning of the Initial Decision and the record on which it is based to review the sufficiency of Judge Kline's conclusions. Again, we are unswayed by Levatino's unsupported factual arguments in support of its exception. The record substantiates Judge Kline's determination and whether or not some evidence is credible and some not is a determination within the discretion of the Judge. We do not see fit to overturn this decision as we find it adequately supported by the record and discussed adequately in the Initial Decision. Judge Kline's determination is far from unsupported by credible evidence and we are not impressed by the argumentative conclusions by which Levatino seeks to overturn this finding.

With respect to all issues discussed above, we have painstakingly reviewed the record of this proceeding in light of exceptions taken to the Initial Decision. As noted above, we do not find persuasive reason in any of those issues to warrant overturning the conclusions of Judge Kline. We, therefore, have adopted the findings of fact determined by Judge Kline with the exception of one factual issue raised on exception by Grace regarding Judge Kline's finding No. 40 regarding testimony as to certain percentages of cargo given by Stephen Levatino.[3]

With the exception of that single factual determination and insofar as the allegations relating to issues other than shutouts are concerned, we concur with the determinations made by Judge Kline and hereby adopt those findings as our own. Specifically, we adopt his conclusions that:

(1) Grace is found not to have discriminated against complainant unjustly or to have subjected complainant to undue or unreasonable prejudice or disadvantage in furnishing terminal and fumigation facilities during the 1966 and 1967 Chilean fruit and produce season;

(2) Grace is found not to have entered into agreements with warehouse companies in 1966 and 1967 which constituted the type of agreement required to be filed for approval by section 15 of the Act; and

(3) Grace is found not to have given rebates or to have discriminated against complainant, in violation of sections 16 First and 17 of the Act, in settling two proceedings brought before this Commission by importers of Chilean fruit and produce.

[3]See discussion of this issue below.

As noted above, Complainant takes exception to Judge Kline's treatment of the issue of shutout cargo. Likewise, Respondent filed exceptions as to this issue. In fact, Respondent's exceptions are entirely directed to this issue. Because of the issues raised on exception regarding shutout cargo, that problem will be dealt with in its entirety at this time.

Complainant, Levatino, objected to Judge Kline's conclusions regarding the shutting out by Grace of Levatino's cargo. Additionally, Respondent Grace filed a protest alleging error by the Judge as to his conclusions regarding sections 14 Fourth and 16 First violations by Grace and the various underlying findings which were used to support those conclusions.

In resolving the issue regarding shutouts in his Initial Decision, Judge Kline made no specific findings as to any unjust discrimination or unreasonable prejudice or disadvantage imposed by Grace upon Levatino. Rather, he found that the general prohibition of sections 14 Fourth and 16 First against any carrier unfairly treating any shipper had been breached by Grace with respect to both Levatino and other shippers in this trade, stating:

> In the instant case the violations of Section 14 Fourth and 16 First do not center on discrimination against Levatino, since the record clearly shows that numerous shippers suffered shutouts in addition to Levatino.

We do not necessarily agree with this conclusion or the principle of law upon which it is based. We are of the opinion that further discussion of that issue is warranted here.

As to shutouts, at issue in this proceeding was only Levatino's charge that Grace had violated sections 14 Fourth, 16 First and 17 of the Act by failing to provide Levatino with space accommodations for Levatino's cargoes which Grace had contracted to carry. While we do not insist upon overnice limitation of issues to those framed in the various pleadings, we are of the opinion that the extension of this claim to a general investigation of a course of conduct pursued by Grace with respect to many other shippers was unwarranted.

In essence, Grace claims in its exceptions that the issue defined by Judge Greer (who initially heard the case) was unequivocally limited to the question of discrimination by Grace *against Levatino,* and that the reframing of this issue by Judge Kline in his Initial Decision was an unwarranted and surprising extension of the case against which Grace had no chance to defend itself. In support of this position, Grace cited the record in which Judge Greer stated:

> It is my understanding . . . that . . . the complainant's cargo was left behind as well as the cargo of other shippers. We have established that. *We are talking about discrimina-*

tion. I don't know how you intend to show that there was discrimination in favor of someone if everybody's cargo was left behind. (Emphasis Grace's)

Grace further claims that, had it known that it was to be forced to defend itself against the broader issue of general unfairness against all shippers through a course of conduct, it could well have adduced evidence by which it could have so defended itself. It claims that it could readily be shown that Grace used procedures for loading cargo in Valparaiso for many years which worked quite to the satisfaction of all concerned shippers. Further, it claims that it could show that these procedures in fact worked well even into 1967, but that only at the height of the season and because of "unusual circumstances" did these procedures break down. Because of Grace's alleged ability to explain and to justify any general unfairness as found by Judge Kline, Grace maintains that fundamental fairness demands that it be given the opportunity to present such evidence and to be accorded the fair hearing provided by the APA, various court decisions, and the Constitution itself.

While we express no opinion here as to the merits of any evidence which Grace might proffer in this regard, we find that Grace is entitled to present whatever evidence it may wish to rebut this broader charge. The broader issue framed by Judge Kline with respect to a course of conduct constituting such violations as to all shippers in a given trade warrants further consideration, both with regard to this proceeding and as a general principle. In addition to Respondent's exceptions in this regard, Complainant also alleged in its exceptions that Judge Kline erred in his treatment of the issue of shutouts. Levatino urges that:

> Judge Kline did not find GRACE discriminated against LEVATINO by shutting out LEVATINO cargo. LEVATINO submits that the failure to find discrimination against LEVATINO ignores the weight of the credible testimony.

In light of this discussion, we reserve judgment as to subjection by Grace of Complainant to unfair treatment, unjust discrimination, or undue or unreasonable prejudice or disadvantage with respect to shut-out cargo. Additionally, we hereby give notice of our intention to remand this proceeding for evidentiary hearing with respect to the practices described regarding cargo loading practices by Grace in the Chilean fruit and produce trade.

One further issue raised by Grace on exception merits our consideration here. Grace alleges that Judge Kline erred in accepting certain percentages cited on the stand by Stephen Levatino regarding amounts of his cargo shut out six years prior to his testimony. Grace maintains on exception that this testimony, which conflicts with its

own contemporaneous charts and figures, is inherently open to doubt because of the time elapsed between the events and the testimony. Whether or not this testimony is accurate, Grace further states, the figures provided are unnecessary to any determination made by Judge Kline. We agree that the figures provided without corroboration on the stand by a witness six years after the events are of somewhat dubious reliability. However, we also agree that acceptance or rejection by us of these figures is irrelevant to Judge Kline's treatment of shutouts. We therefore express no opinion as to their validity and refrain from adopting these figures as facts. The validity of these figures will be assessed more thoroughly upon the further hearing regarding this issue.

Therefore, it is ordered, That to the extent specified herein, the Initial Decision is hereby adopted.

It is further ordered, That there be remanded for full evidentiary hearing before an Administrative Law Judge the following matters with respect to the issue of "shutout" cargo:

1. Specific findings shall be made as to whether or not Respondent subjected Complainant to unjust discrimination or undue or unreasonable prejudice or disadvantage in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916, all as alleged in the complaint filed herein.

2. Specific findings shall be made as to the amounts of cargo booked by Respondent which the actions of Respondent caused to be left on the pier and not transported (including therein a definition of what constitutes "booked" cargo).

3. Specific findings shall be made as to why Respondent's loading and booking procedures were: (1) inadequate; and (2) of sufficient extent to amount to a failure to have observed reasonable procedures and practices in violation of sections 14 Fourth and 16 First.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 70–53

LEVATINO & SONS, INC.

v.

PRUDENTIAL-GRACE LINES, INC.

Respondent's failure to observe reasonable loading and booking procedures for a limited period of time in 1967, subjected complainant and other shippers to unfair treatment and undue and unreasonable prejudice and disadvantage, in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916.

Respondent found not to have discriminated against complainant unjustly or to have subjected complainant to undue or unreasonable prejudice or disadvantage in furnishing terminal and fumigation facilities during the 1966 and 1967 Chilean fruit and produce season.

Respondent found not to have entered into agreements with warehouse companies in 1966 and 1967 which constituted the type of agreement required to be filed for approval by section 15 of the Act.

Respondent found not to have given rebates or to have discriminated against complainant, in violation of sections 16 First and 17 of the Act, in settling two proceedings brought before the Federal Maritime Commission by importers of Chilean fruit and produce.

J. Joseph Noble and *James A. Gallagher, Jr.* for complainant.
H. Richard Schumacher and *Michael R. Royster* for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was initiated by the filing of a complaint on December 29, 1970, in which complainant Levatino & Sons, Inc. (Levatino) alleges that respondent Prudential-Grace Lines, Inc. (Grace), during the years 1966, 1967, and 1968, violated sections 14 Fourth, 16 First, and 17 of the Shipping Act, 1916 (the Act), by failing to provide Levatino with space accommodation for cargoes which Grace had previously contracted to carry, by unfairly and unjustly discriminating

[1] This decision became the decision of the Commission 12/16/74

against Levatino and unduly and unreasonably preferring competitors of Levatino with regard to the furnishing of warehousing and fumigation facilities, and by entering into settlements with competitors of Levatino in satisfaction of complaints filed with the Federal Maritime Commission by such competitors.

On September 12, 1969, Levatino had commenced an action against Grace in the United States District Court for the Southern District of New York seeking compensatory damages in the sum of $3,765,000, alleging substantially the same violations of the Act, as well as violations of the common law of the State of New York. *Levatino & Sons, Inc.* v. *Grace Line, Inc.* 69 Civ. 3983. In response to a motion to dismiss filed by Grace, the Court, by order dated August 25, 1970 stayed the action:

> . . . subject to further order of the Court, pending referral by plaintiff LEVATINO & SONS, INC. to the Federal Maritime Commission of the claims alleged in the complaint herein which are or may be within the said Commission's jurisdiction and the final disposition of any proceedings initiated by said plaintiff before said Commission. . . .

In accordance with the Court's directive, Levatino filed its complaint with the Commission. Upon motion of respondent, however, that portion of the complaint relating to the issue of reparation was dismissed, it appearing that the complaint was filed more than two years subsequent to accrual of the cause of action. See Order on Motion to Dismiss, May 20, 1971.

Hearings were held before Administrative Law Judge Herbert K. Greer in Washington, D.C. on April 23, 24, May 3 and 4, 1973. Upon the retirement of Judge Greer in June 1973 the case was reassigned to Administrative Law Judge Norman D. Kline.[2]

FACTS

The Parties.

1. Complainant is one of a number of corporate entities through which members of the Levatino family have engaged in the importation and distribution of food products from Chile, Argentina, Italy, and other countries since shortly after the Second World War. Complainant was formed on December 24, 1963 by three brothers, Stephen, Anthony, and Joseph Levatino, and three sons of Stephen and Anthony Levatino. Subsequently a fourth son was admitted to part ownership. Apart from the interest of Anthony which presumably passed to his estate at his death, these ownership interests have continued to the present.

[2]Prior to the reassignment Judge Kline attended the hearings as an observer and therefore was afforded an opportunity to assess the credibility of the witnesses through personal observation of their demeanor.

2. Complainant actively engaged in the importation of food products until late September or early October 1967 when the Levatino family reorganized their business, each of the three elder brothers forming separate importing corporations. Although complainant ceased to engage in active business, it remained in existence as a corporate shell whose only function seems to be the prosecution of this proceeding and other claims against Grace.

3. Respondent Grace is a Delaware corporation with headquarters in New York City. For many years, including the period relevant to this complaint (late 1965 through early 1968) Grace has operated ships of American registry in a scheduled common carrier liner service between the Port of New York and the West Coast of South America, including Valparaiso and other ports in Chile. Prior to January 1970 respondent was owned by W. R. Grace & Co. and was known as Grace Line, Inc. In late 1969, interests associated with the late Spyros Skouras and his family acquired Grace Line, Inc. and changed its name to Prudential-Grace Lines, Inc. This acquisition was approved by the Federal Maritime Commission. *Agreement No. 9810,* 13 F.M.C. 156 (1969). Both before and after the acquisition Grace carried substantial quantities of Chilean fruit and produce.

The Structure of the Chilean Fruit and Produce Trade

4. The annual carriage of fruit and produce from Valparaiso, Chile to the Port of New York is seasonal, occurring during the period beginning in late December until May or early June of the following year.[3] Importation of such foodstuffs depends on the temporal reversal of seasons between the Northern and Southern Hemispheres and involves the exportation to North America and Europe during the Northern Hemisphere's winter and spring of commodities grown during the Chilean spring and summer.

5. The commodities in question may be divided into two categories: (a) "fruit", which includes grapes, nectarines, plums, pears, and other so-called "soft" fruit; and (b) "produce" (known in the trade as "hardware") which includes melons, onions, and garlic. The fruit is carried aboard ship in refrigerated stowage, the produce in ventilated stowage, and are also handled differently upon discharge in the United States.

6. In the two decades between the end of the Second World War and the period in issue here, a large number of Chilean firms participated in the export of fruit and produce. The farms providing these crops generally are located in the Aconcagua Valley and other areas

[3]A particular season, unless otherwise noted, will be referred to as the year in which the season ended, i.e., "1968 season" refers to the season which began in the closing months of 1965 and concluded in late spring of 1966.

of central Chile in and about Santiago. The port of shipment is Valparaiso.

7. During the years in question (1965 through 1968), the receivers of Chilean fruit and produce in New York were a dozen or so importers, including complainant and its predecessors. These receivers competed vigorously among themselves for the available Chilean fruit and produce business, regularly sending representatives to Chile before the season to line up suppliers who would ship to them. Stephen Levatino performed this crucial function for complainant.

8. Prior to 1965, the exporters usually shipped their goods to the United States on consignment. Under this system, the importer was in substance, a receiving market broker. He sold the goods, deducted from the proceeds of sale the costs of shipment, handling, and sale plus a commission for himself and then made the remaining proceeds available to the supplier. Beginning with the 1965 season or perhaps earlier, other methods of sale came into use. Some importers sent advances to their suppliers before the planting season and deducted these advances before remitting any proceeds of sale. Some receivers began to purchase fruit outright in Chile. Others, including Levatino, instituted "joint account" sales, whereby supplier and receiver divided the proceeds in agreed percentages.

The Handling of Fruit and Produce in Manhattan

9. During the 1960's, including the years of primary relevance here, 1966 and 1967, Grace operated six vessels in a scheduled weekly service between Valparaiso and the Port of New York, usually arriving in New York on Monday. These vessels had both refrigerated and ventilated space which was used to carry Chilean fruit and produce respectively. The vessels also carried substantial quantities of coffee. During this period Grace also operated another scheduled weekly service between the Port of New York and the West Coast of South America, chiefly carrying bananas loaded at Guayaquil, Ecuador and coffee loaded in Colombia.

10. Until after the end of the 1965 season, Grace's vessels arriving from Chile discharged their cargo at the terminal which Grace maintained at North River Piers 57 and 58 in Manhattan. The terminal was heated. Each pier had two covered floors and the piers were connected through a structure at their heads. The terminal served not only vessels operating in the Chilean trade but vessels serving various routes to the Caribbean, including two passenger cruise vessels.

11. Upon arrival of a vessel carrying Chilean fruit and produce at the North River terminal, the fruit consigned to all receivers was discharged onto the pier and moved as quickly as possible into heated lighters supplied by the receivers. This movement was usually accomplished within 12 to 14 hours of the vessel's arrival. Delivery into the lighters terminated Grace's responsibilities toward the fruit. Because of this rapid movement, no free storage time was granted to receivers.

12. After delivery into the lighters, the fruit was carried down river to the Fruit Auction Pier, also called the Pennsylvania Railroad Pier, at Pier 29. This pier contained the sales rooms of the New York Fruit Auction Company, a sales agency which handled various imported fruits as well as domestic products. The cost of lighterage was borne by the receivers.

13. At the Fruit Auction Pier, stevedores removed the fruit from the lighters and placed it on the pier for inspection by the Plan Quarentine Division of the United States Department of Agriculture. The receivers paid for these stevedoring services. After inspection, the fruit was fumigated by an independent contractor pursuant to requirements instituted by the Department of Agriculture several years prior to 1965. The fumigating contractor was paid solely by the receivers.

14. During the night following fumigation, the fruit was again sorted by label and placed on the pier for inspection by prospective buyers. After inspection, it was sold at auction, the auction company receiving a commission for its services. All services were paid for by the receivers. When fruit was imported on consignment, the costs of lighterage, sorting, fumigation, etc. were a charge against the proceeds otherwise due the exporter.

15. The receivers in the Chilean trade did not consider this method of distribution to be entirely satisfactory because the movement by lighter from the Grace terminal down river to the Auction Pier was expensive and exposed the fruit to the hazards of winter weather and pilferage. Grace had at one time expended over $100,000 in renovating and equipping a portion of Pier 58 with the objective of establishing a facility for handling, fumigating, sampling and auctioning Chilean fruit. Although this plan had the support of most receivers, including complainant or its predecessors, it was aborted because of labor problems.

16. Produce was handled in a different manner from fruit after its arrival at the Grace terminal. The produce consigned to all receivers was first discharged from the ship onto the pier. It was then put on pallets and moved by stevedores supplied by Grace to a heated area of the terminal where it was sorted by bill of lading, mark and crate

size and was stored. If any crates needed recoopering, this was also done at Grace's expense. When a receiver wished to take delivery of his produce, he made an appointment and sent a truck to the terminal. The produce was then taken from the heated storage area to the tailgate of the truck by Grace's stevedores where delivery was effected. A certain period of free time was granted during which the produce could be left in the terminal without incurring demurrage charges. All of these services were included in the freight rate for produce.

17. Grace encountered some operational problems in handling Chilean produce at its North River Terminal, experiencing congestion caused by the regular weekly influx of coffee and other cargo requiring large amounts of pier space, the seasonal arrival of Chilean produce, storage of melons during periods when the market was poor, limited space for trucks to gain access, and pilferage.

The Shift to Port Newark in Late 1965

18. In the early 1960's Grace leased facilities at the Port Newark terminal on the west shore of Newark Bay. This terminal afforded upland space, useful in the operation of container ships which was not available at Manhattan's North River piers. By 1963 Grace had shifted to Port Newark its terminal operations for its service between Callao, Peru and New York. In the latter part of 1965, Grace also moved the terminal operations for its Chilean service. The latter move was prompted by the impending delivery over the next few years of six new container ships of the SANTA LUCIA class which Grace intended to use in its Chilean service. It was also felt that consolidation of both of its services to the West Coast of South America at one terminal would be more convenient for shippers of southbound cargo.

19. Grace's terminal at Port Newark consisted of two buildings, Sheds 138 and 140, on the north side of the port's north channel, and adjacent berthing facilities. Only a part of one of the two buildings was heated.

20. Grace anticipated that during the annual seasonal movement of Chilean fruit and produce, it would encounter congestion problems such as it had experienced at its North River Terminal and would not have sufficient facilities to handle the total volume of produce cargo because of the limited availability of heated space required for handling and storing both Chilean produce and coffee carried in the two services from the West Coast of South America. Grace dealt with the problem in 1966 and subsequent seasons by providing for the immediate removal of some of the incoming cargoes which would other-

wise require heated storage in Shed 140, either produce or coffee.

21. Prior to the start of the 1966 season, executives of Grace entered into discussions with two of complainant's principals, Stephen Levatino and his son Pat, regarding the problem of Grace's inability to handle the large volume of cargoes at its terminal in Newark. Grace proposed to Levatino, who received the largest volume of Chilean produce moved aboard Grace's vessels, that separate warehouse space apart from Grace's terminal be arranged for Levatino as a substitute for the terminal facilities which Grace was obligated to provide. Grace encouraged Levatino to utilize a warehouse established by a third party in order to avoid any questions of impropriety under the Shipping Act. As a result of negotiations, which were conducted on complainant's side by Stephen Levatino with the aid of counsel, in November 1965, members of the Levatino family formed Newark Dockside Warehouse Company which in turn rented three contiguous sheds, numbered 105, 106, and 109, near the Grace terminal.

22. On November 23, 1965, Newark Dockside entered into a written contract with Grace by which Newark Dockside undertook, for receivers who agreed to such handling, to remove produce by truck from Grace's pier immediately upon its arrival, carry it to Sheds 105, 106, and 109, and there provide the sorting, storage and other services normally supplied by Grace in its terminal. Grace, in turn, agreed to pay Dockside 26 cents per box for such services, an amount which studies had indicated was the cost Grace would incur for similar handling in Sheds 138 and 140. Simultaneously Levatino agreed in writing with Grace that its incoming produce cargoes could be handled in this manner during the 1966 season. This alternative method of handling was advertised to other receivers by Dockside, which published a tariff, but only Levatino and one other importer, Yeckes-Eichenbaum, Inc. chose to avail themselves of it.

23. As a result of the foregoing events, the following methods of handling produce obtained during the 1966 season. Produce consigned to receivers other than Levatino and Yeckes-Eichenbaum was delivered upon arrival into Grace Line's sheds and handled as it had always been at Pier 58, namely, placed in a heated area, segregated by bill of lading and held for ultimate delivery to the consignee upon presentation of his delivery order and arrangements for trucking. Produce consigned to Levatino and Yeckes-Eichenbaum, about one-half of the total carried by Grace, was removed by Dockside's trucks immediately upon arrival and carried to Sheds 105, 106, and 109 where it received similar handling. Grace paid more then $74,000 to Dockside for the furnishing of these services during the 1966 season.

24. In 1967, Newark Dockside and Levatino concluded written

agreements with Grace similar to those of the year before. Grace entered into similar agreements with Port Entry Expeditors, the operator of another warehouse in the Port Newark complex, and with two other warehouse companies located in Manhattan who agreed to remove the produce consigned to other receivers. During the 1967 season, 85 to 90 percent of Grace's incoming Chilean produce was removed by truck immediately upon arrival by various warehousemen, while the remainder, consigned to receivers who did not elect this form of handling, went into Sheds 138 and 140 and was processed there. Payments by Grace to Dockside during the 1967 season amount to $33,340.

25. In 1968, Grace abandoned these alternative methods of handling Chilean produce and took it all, including that consigned to the various companies with which members of the Levatino family were then associated, into Sheds 138 and 140. To make room for the produce during the period of the Chilean movement, Grace elected to provide for the removal and storage of incoming Colombia coffee in a separate warehouse maintained by the Held Company in the Port Newark complex. This procedure was followed during the Chilean fruit and produce seasons of 1969 and 1970. By 1971, Grace had cut back its Chilean service to a fortnightly schedule which eliminated the congestion problem and the need to farm out coffee.

The Handling of Fruit at Port Newark

26. During the 1966 season, all receivers of Chilean fruit carried aboard Grace's vessels, except Levatino and an affiliated company, elected to receive their fruit into lighters at Port Newark and to transport it to the Fruit Auction Pier in Manhattan for sale. The procedure was similar to that followed in earlier years for fruit delivered through Grace's North River piers.

27. For several weeks at the beginning of the 1966 season, Levatino and an affiliated company elected to meet Grace's vessels with flat-bed trucks in order to receive their fruit in these trucks rather than lighters. They then trucked it to the nearby sheds of Newark Dockside where they provided or obtained whatever processing was required, including fumigation, and sold the fruit at auction or by private sale in competition with the fruit auction in Manhattan. Early in March 1966, however, Levatino and its affiliate abandoned this procedure in favor of receiving fruit in lighters which were moved to the Fruit Auction Pier in Manhattan in the same manner as the cargo of other receivers. The costs of handling and processing fruit by the trucking method appears to have been about 7 or 8 cents a box less than those

incurred in delivery to the lighters. The Levatinos, however, were unable to attract buyers to Port Newark, according to Stephen Levatino, because of union opposition.

28. Grace had no agreement with Dockside or anyone else in connection with fruit shipments received during the 1966 and 1967 seasons. All receivers of fruit took delivery either by lighter or, in the case of a few shipments to Levatino and an affiliate, by truck. Prior to the 1966 season, the tariff of the West Coast South American Northbound Conference applicable to Grace's Chilean service was amended to provide for the immediate delivery in New York of small fruit to either lighters or trucks, provided by the receiver.

The Matter of Fumigation

29. Several years prior to 1965, the Department of Agriculture imposed a requirement that all incoming Chilean fruit, as distinguished from produce, be subjected to fumigation. That requirement has been continued. There is no dispute that with respect to fruit carried to the Port of New York by Grace, this procedure has been accomplished without exception by the receiver, at his expense, after the removal of the fruit from Grace's premises.

30. The requirement that Chilean melons be fumigated was imposed during the 1965 season, the last season in which Grace berthed its vessels on the North River. The reason for the requirement was the discovery of insects in the excelsior packing of a few shipments of melons received at Grace's terminal. The receivers of these melons requested that Grace permit them to arrange for fumigation on Pier 58 but were refused permission with the result that they were required to truck the melons to a fumigation facility elsewhere in Manhattan at their own expense before making them available for sale.

31. The infestation of occasional melon shipments and the corresponding requirement of selective fumigation continued during the 1966 season, the first in which Grace vessels berthed at Port Newark. Melons consigned to Levatino were fumigated at the sheds of Newark Dockside, to which the latter, as Grace's contractor, had removed them on arrival. Dockside supplied, without charge to Levatino, the use of floor space and pallets, but Levatino was required to pay an outside fumigation contractor for the furnishing of equipment and service and for other labor costs involved as well as the costs of installing electrical wiring, piping, and exhaust fans.

32. When confronted with this same requirement of occasional fumigation, some of the receivers of the melons which were being taken into Grace's sheds upon arrival requested, as in 1965, that they be

permitted to accomplish the necessary fumigation on Grace's premises. Grace at first denied the request because of the interference with normal pier activities and the hazards posed by the methyl bromide gas used in the fumigation process. When the receivers persisted in their requests, however, Grace agreed to permit fumigation on its pier during the weekend following the shipment's arrival, which arrival usually occurred on a Monday. This arrangement was not entirely satisfactory to receivers because they would have to wait more than a week for delivery of their melons. If receivers wished earlier fumigation, they were required to take delivery from the terminal and transport their melons elsewhere for fumigation.

33. Two receivers, on one occasion each, elected to fumigate melons on Grace's premises. On these occasions, the receivers contracted with an independent fumigation company, which brought in the necessary facilities, i.e., tarpaulins, blowers and flexihoses. The receivers paid for all these services and for the service of Grace's stevedoring contractor whose personnel moved and stacked the melons preparatory to fumigation. Grace contributed the use of its floor space and pallets on which the melons were stacked. Levatino was informed of these particular occasions, which it believed to have occurred on a Wednesday evening, and protested to Grace that it wanted all of its melons and fruit fumigated at the Grace terminal prior to delivery to Newark Dockside.

34. The need for melon fumigation substantially disappeared in subsequent seasons owing to changes in packing from excelsior to cardboard and other reforms in packing procedures instituted in Chile.

35. The fumigation operation at Newark Dockside involved fruit to a much greater extent than melons, in a ratio of two or perhaps even three to one. After Levatino chose to abandon its efforts to market fruit at Port Newark, and resumed the familiar procedure of lightering its fruit to Manhattan for fumigation and sale at the Fruit Auction Pier, Dockside's fumigation income and expense dropped substantially. Material circulated to the trade by Dockside in late 1965, furthermore, emphasizes fumigation facilities for fruit but does not even mention facilities for melons.

The Matter of Shutouts

36. A shutout occurs when cargo intended to be loaded on a ship is not loaded and is left behind when the ship sails. Shutouts are detrimental to the carrier as well as the shipper since cargo left behind does not generate freight revenue and may provide business for competing carriers.

37. During the 1967 season, one of complainant's principals, Stephen Levatino, complained to Admiral McNeil, President of Grace, about shutouts affecting complainant's cargoes in Valparaiso.[4] At or about the same time, other shippers and receivers of Chilean fruit and produce were making similar complaints about shutouts affecting their cargoes. As a result of these complaints, Grace dispatched Mr. Charles Nation, one of its executives, and the late T. D. Baker, then the head of a firm of cargo surveyors retained by Grace, to Chile in March 1967, with directions to investigate the problem and solve it. Mr. Nation arrived in Chile on March 6, 1967, and remained until April 7, 1967. Mr. Baker remained about 10 or 12 days.

38. Upon his arrival in Chile, Mr. Nation proceeded directly to Valparaiso. He was approached by a Mr. Pesut of Cia. Frutera Sud-Americana, a major shipper of fruit and produce, doing business with receivers other than complainant, Mr. Pesut and several shipping brokers complained bitterly to Mr. Nation about the shutouts. On the same day, Mr. Nation personally observed the loading of Grace's vessel SANTA CLARA which was then on berth in Valparaiso and which left fruit and produce behind on the dock when she sailed. Mr. Nation informed Grace's executives in New York that the carrier had a problem and was directed by Admiral McNeil to take charge of the situation and to remain until the problem was solved.

39. According to a chart prepared at Mr. Nation's direction by Grace's staff in Valparaiso, fruit and produce cargoes were shutout from the first seven voyages of the 1967 Chilean fruit season. The chart shows, furthermore, that cargo offered by exporters who dealt with Levatino was shut out and that cargo offered by exporters who dealt with other receivers in New York was also shut out. The shutouts appear to have affected cargoes offered by a large number of shippers intended for a large number of receivers without consistent pattern.

40. Although cargoes consigned to receivers other than Levatino were also shut out, the volume of shutouts affecting Levatino were significant, and on at least one occasion, the voyage of the SANTA ELISA sailing on January 27, 1967, only cargo consigned to Levatino, consisting of 2,000 boxes of melons, appears to have been shut out.[5] For example, 30 percent of Levatino's cargo was shut out on the aforementioned voyage of the SANTA ELISA; 20 to 30 percent on the voyage of the SANTA ISABEL sailing on February 2 or 3, 1967; 40 to

[4]On brief, complainant contends that it also experienced shutouts during the 1966 season. At the hearing, however, complainant's witness, Stephen Levatino, denied that this had occurred. If shutouts did in fact occur in 1966, however, the record fails to explain the circumstances, unlike the situation in 1967.

[5]Levatino contends that it was the only receiver suffering a shut out on the voyage of the SANTA OLIVIA sailing on March 4 or 5, 1967. The chart prepared by Grace's staff, however, indicates that numerous cargoes were shut out, not just those of shippers doing business with Levatino.

50 percent on the voyage of the SANTA CATALINA sailing on February 10 or 12, 1967. On the February 17 voyage of the SANTA CRUZ, 15,000 boxes of melons consigned to Levatino were left behind. In a number of instances shutout cargoes were loaded aboard vessels of carriers competing with Grace, i.e., Flota Mercante Grancolombiana or the Chilean Line. In other instances they were loaded on Grace's vessels sailing at a later date.

41. Mr. Nation ascertained that the shutout problem had two major causes. First, Grace's booking procedure, as Mr. Nation described it, was "very sloppy." It consisted of a call to shippers each Thursday asking them what they had to offer for the following week's sailing. This procedure led to unreliable and inflated bookings and made it impossible for Grace to obtain in advance an accurate estimate of the amount of cargo which would actually be delivered to the pier for loading. Second, inadequate advance planning for loading often resulted in the Grace ships being forced to sail before loading operations were completed.

42. While in Chile, Mr. Nation devised and instituted new booking and load-planning procedures. A practice was instituted by which Grace's staff would call shippers and offer them definite bookings, for example, 7,000 cases of grapes, in an effort to obtain an accurate and firm commitment from the shipper. The shipper might suggest the need for more or less space and adjustments would be made where possible, but in any event, Grace would obtain a more or less fixed commitment. Load-planning procedures were improved by laying out the loading plan for the vessel on the Tuesday of the week prior to the vessel's arrival in consideration of a number of factors such as capacity, anticipated port time, etc. and relaying the proposed plan to the ship's Master for his approval or alteration. After these reforms were instituted, no further shutouts occurred.

The All Chilean Settlement

43. On November 22, 1966, a proceeding entitled *All Chilean Fruit Corp. et al.* v. *Grace Line, Inc.*, Docket No. 66–64, was commenced by the filing of a complaint with the Federal Maritime Commission. The complainants were ten companies and individuals who were competitors of Levatino. On December 19, 1966, a similar complaint was filed by another receiver of Chilean fruit and produce in a proceeding entitled *Arthur Schwartz and Justamere Farms, Inc.* v. *Grace Line, Inc.*, Docket No. 66–69. The two proceedings were consolidated and will be referred to hereinafter as the "All Chilean" case.

44. The complainants alleged various violations of the Shipping Act, 1916, consisting of several instances of purported discrimination by Grace in favor of Levatino. The crux of the complaints, however, was a contention that Grace had paid to Levatino a rebate of 26 cents per box on all fruit and produce received by Levatino during the 1966 season. The complainants in Docket No. 66–64 sought reparation in the amount of $1,400,000 and those in Docket No. 66–69, $100,000.

45. A prehearing conference was held in April 1967 before Presiding Examiner Benjamin A. Theeman. Informational material was exchanged among the parties and filed with the Examiner in October 1967, followed by motions addressed to the alleged inadequacy of the complainants' submissions.

46. Grace signed a settlement agreement with the complainants in Docket 66–64 on December 14, 1967 and with the complainants in Docket 66–69 on January 22, 1968. The agreements provided that the attorneys of the respective parties would present the proposed settlement to Examiner Theeman pursuant to Commission Rule 6(c) and would request dismissal of the complaints. If such dismissal were forthcoming, Grace would then forthwith deliver against releases a single check for $80,000 to the order of complainants'attorneys in Docket No. 66–64 and a single check for $1,000 drawn to the order of complainants' attorneys in Docket No. 66–69. The settlements were presented to Examiner Theeman who entered an order dismissing both complaints on January 23, 1968. On January 26, 1968, counsel exchanged the prescribed checks and releases.

47. In the current proceeding, Levatino took the depositions of seven officers or former officers of complainants in Docket No. 66–64. Each of these individuals indicated that he and his company had participated in the suit in good faith.

48. The settlement was negotiated solely by the parties' attorneys and was fixed by them as a lump sum. The complainants did not know the figure until they were informed of it by their attorneys. Several of them thought it was inadequate.

49. Grace made a single $80,000 payment to the complainants' attorneys, who, after deducting their fee, sent each complainant a check for its share of the balance. This balance appears to have been allocated among the complainants in accordance with the relative volumes of their business by means of a formula devised by the complainants and their attorneys.

50. Representatives of the complainants in the All Chilean case testified that they had never discussed the allocation of the settlement payment with Grace's attorneys or any other representative of Grace.

Apparently, Grace had no knowledge of that allocation until after the commencement of the present proceeding.

51. In presenting the proposed settlement to Examiner Theeman in January 1968, Grace's counsel expressed the view that a full-scale defense of the two complaints, however successful, would cost Grace more in legal fees than the projected settlement. According to the testimony of Jerome Doyle, Esq., a senior member of the law firm of Cahill, Gordon and Reindel which had represented Grace inthe All Chilean case, an attorney with over 25 years of experience in the conduct and settlement of litigation, the settlement in the All Chilean case was prudent. According to Mr. Doyle, costs of litigation accelerate substantially as the case proceeds from the early stages of discovery to trial and appeal, costs accruing during the latter two stages usually being double and triple respectively the costs of the early stage. When the All Chilean case was settled, costs incurred by Grace had come to approximately $70,000. Had the case gone to trial, Mr. Doyle was of the opinion that Grace would have incurred additional legal expenses of $120,000 to $130,000 for its counsel's conduct of the trial and post-trial briefing. Mr. Doyle testified that recommendations for settlement take into consideration future costs of litigation aside from the merits of the case and that settlements are prudent if a defendent can obtain a settlement for less money than it would have to expend to defend a case successfully.

DISCUSSION AND CONCLUSIONS

Levatino contends that the issues in this case simply involve discrimination practiced by Grace against Levatino and rebating in favor of competitors of Levatino. More specifically Levatino categories its contentions as follows:

1. Grace shut out quantities of Levatino's cargoes from its ships loading at Valparaiso on certain occasions in 1966 and 1967, thereby discriminating against Levatino, in violation of sections 14 and 16 of the Act.

2. Grade did not provide terminal and fumigation facilities for Levatino but did so for other receivers of fruit and produce at Grace's terminal in Port Newark during 1966 and 1967, thereby forcing Levatino to bear the expense of providing its own facilities, in violation of sections 16 and 17 of the Act.

3. Grace entered into agreements with Levatino and a warehouse company established by Levatino which provided space for the storage of fruit and produce, without filing these agreements with the Federal Maritime Commission as required by section 15 of the Act.

4. Grace effected a settlement with importers of fruit and produce other than Levatino who had filed formal complaints with the Federal Maritime Commission in two docketed proceedings whereby Grace paid such importers a total of $81,000, which constituted a rebate, in violation of section 16 and 17 of the Act.

Except for the first contention regarding shutouts, the record fails to demonstrate that any of these contentions has merit. Levatino, furthermore, cites few authorities for its various contentions and in one instance, alleges a violation of section 15 on brief although no mention of such violation had been made in its complaint or in any of its previous pleadings.

The Issue of the Shutouts

Levatino contends that the shutouts which it suffered on the first seven voyages of the 1967 season were the product of discrimination against it as well as other shippers who were likewise affected. Grace admits that these shutouts occurred but argues that they merely represent "commercial inefficiency" rather than violation of law and that in any event the situation affected a wide range of shippers indiscriminately.

Section 14 Fourth of the Act provides in pertinent part that no common carrier by water shall, directly or indirectly:

> unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition . . .

Section 16 First of the Act makes it unlawful for a common carrier by water:

> To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Although Levatino concentrates on the issue of discrimination in contending that sections 14 and 16 have been violated, it is not the question of discrimination that is determinative on the present record but rather the question whether Grace complied with its statutory obligation to treat shippers fairly in the matter of space accommodation and to avoid subjecting any person to undue or unreasonable prejudice or disadvantage in any respect whatsoever. Considering evidence adduced by Grace itself that Grace failed to observe reasonable booking and preplanning procedures for a brief period in 1967,

it is clear that Levatino and other shippers whose cargoes were shut out were not treated fairly and were subjected to undue and unreasonable prejudice and disadvantage.

It is, of course, the basic duty of a common carrier to take the goods of all who offer unless his complement for the trip be full. *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 615, 620 (1959), affirmed sub. nom. *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F. 2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961). It has also long been recognized that where the demand for space exceeds the supply, a common carrier must equitably prorate its available space among shippers. *Banana Distributors, Inc.* v. *Grace Line, Inc.*, cited above, at page 625; *Penna. R.R. Co.* v. *Puritan Coal Co.*, 237 U.S. 121 (1915); *Boston Wool Trade Asso.* v. *Merchants & Miners Trans. Co.*, 1 U.S.S.B. 32, 34, 35 (1921).

A carrier must establish a reasonable plan in order to cope with periods of congestion and must fill its capacity in a reasonable and just manner when such periods occur. *Archibald* v. *Pan American World Airways, Inc.*, 460 F. 2d 14 (9th Cir. 1972). A carrier should, furthermore, exercise some care in avoiding continual overselling which results in refusals to honor commitments. *Wills* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360, 368 (S.D. Calif. 1961).

A failure to apportion available space in proportion to cargo offerings may result in undue prejudice to shippers. *Patrick Lumber Co.* v. *Calmar*, 2 U.S.M.C. 494, 498, 499 (1941); *R. Hernandez* v. *A. Bernstein Schiffahrtsgesellschaft*, 1 U.S.M.C. 686, 691 (1937). In short, the booking of cargo imposes on the carrier certain obligations of fairness and impartiality in dealing with shippers. *Hellenic Lines, Ltd.—Section 16 First and 17 Violations*, 7 F.M.C. 673, 675 (1964).

In the instant case the violations of section 14 Fourth and 16 First do not center on discrimination against Levatino, since the record clearly shows that numerous shippers suffered shutouts in addition to Levatino. It is this indiscriminate pattern, however, which pointedly demonstrates that Grace had, for a time, exercised no care in booking cargo or in preplanning the loading of the vessel. The result was a random pattern of shutouts affecting shippers in varying degrees from voyage to voyage. There is no dispute as to the cause of this problem, Grace admitting that its booking procedure had been "very sloppy" and its preplanning for loading vessels inadequate, and that once reforms were instituted, no further shutouts occurred.

The admittedly inadequate procedures followed by Grace cannot be reconciled with the standard of conduct expected of carriers under sections 14 Fourth and 16 First of the Act, which provide that no common carrier shall "unfairly treat" any shipper in the matter of

space accommodations or "subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." This is not a case of an occasional shutout which might be considered to be an unfortunate but unavoidable fact of life in the shipping business rather than an unlawful practice. *Investigation of Practices of Stockton Elevators*, 8 F.M.C. 181, 200, 201 (1964). Instead, this was a continuous practice which continued unabated throughout seven voyages with the result that hardships were visited upon shippers who tendered their cargoes to Grace in the expectation that the carrier had taken care either to have space available or had established a plan to apportion space in some fair and reasonable manner if demand for space exceeded supply.[5] During this period of time, however, Grace had exercised no care and had established no discernible plan. The fact that Grace subsequently took steps to institute reforms, and quite commendably so, does not alter the fact that its previous practices did not comport with the conduct which the law expects of a common carrier. The failure of a common carrier to treat shippers fairly and impartially in the absence of standards or to apply its standards fairly constitutes a violation of section 16 First. *General Mills, Inc.* v. *State of Hawaii, Department of Agriculture*, 13 SRR 991, 994 (1973); *Valley Evaporating Co.* v. *Grace Line, Inc.*, 14 F.M.C. 16, 22 (1970).

Accordingly, it is found and concluded that during a limited period of time between January and March, 1967, in connection with the first seven voyages of the Chilean fruit and produce season, Grace unfairly treated Levatino and other shippers in the matter of space accommodations and subjected Levatino and other shippers to undue and unreasonable prejudice and disadvantage, in violation of sections 14 Fourth and 16 First of the Act.

The Providing of Terminal and Fumigation Facilities

Levatino contends that Grace did not provide it with terminal and fumigation facilities but did so for other receivers of fruit and produce at Grace's terminal in Port Newark during 1966 and 1967, and that as a consequence, Levatino was forced to provide its own facilities. Such conduct on the part of Grace is alleged to have resulted in undue or unreasonable prejudice or disadvantage and unjust discrimination as against Levatino, in violation of sections 16 and 17 of the Act.

Grace contends that Levatino suffered no prejudice or discrimina-

[5]As was stated in *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 454, 455:

. . . it is the right of shippers to ship in any quantity they choose and the obligation of carriers to carry the quantity tendered to them, due regard being had for the proper loading of the vessel and the available tonnage . . .

tion since Levatino was provided with substantially similar terminal and fumigation facilities by means of Grace's arrangement with Newark Dockside Warehouse, which facilities, if anything, were superior to those provided at Grace's terminal at Port Newark.

Section 16 First of the Act, as seen above, makes it unlawful for a common carrier by water to give any "undue or unreasonable preference or advantage to any particular person" or to subject any such person to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17 of the Act provides that a common carrier by water shall not:

> . . . demand, charge or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports . . .

Section 17 further provides that a common carrier by water or other person subject to the Act shall:

> . . . establish, observe, and enforce, just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property.

Violations of section 16 or 17 are not shown by the mere existence of preference, prejudice, or discrimination. In order to constitute violations, such preference, prejudice, or discrimination must be "undue", "unjust", or "unreasonable", which are factual questions to be determined by the Federal Maritime Commission in its discretion. *A.P. St. Philip, Inc.* v. *Atlantic Land & Improvement Co., etc.*, 13 F.M.C. 166, 174 (1969); *Agreements Nos. T-2108 and T-2108-A*, 12 F.M.C. 110, 122 (1964); *Investigation of Practices of Stockton Elevators*, cited above, at pp. 199, 200.

The record fails to demonstrate that Levatino suffered from undue or unreasonable prejudice or disadvantage or unjust discrimination or that its competitors enjoyed undue or unreasonable preference. What the record does show is that Grace, with the cooperation of Levatino, took steps to cope with an anticipated problem concerning congestion at its terminal in Port Newark before the start of the 1966 Chilean fruit and produce season. The transfer of terminal operations to Port Newark and the consolidation of Grace's South American services at that location convinced Grace that its Port Newark facilities could not handle all Chilean fruit and produce, together with large quantities of coffee and other cargoes moving in the various services. The solution to the problem was to provide alternative storage space to those Chilean produce importers who desired it. Grace, of course, as a common carrier, was obliged to provide a safe and convenient terminal space for the receipt and deliv-

ery of cargo. *Truck Loading and Unloading Rates at New York Harbor,* 13 F.M.C. 51, 62 (1969). In order to relieve the problem of congestion and to fulfill its common carrier obligations, Grace arranged to provide alternative storage space to Levatino and later to other importers who desired it by means of arrangements with separate warehouse companies. It is in the public interest to relieve congestion, indeed, the public interest requires that congestion be minimized in the interest of efficient water transportation. *Free Time and Demurrage Charges on Export Cargo,* 13 F.M.C. 207, 215 (1970); *Free Time and Demurrage Charges-New York,* 3 U.S.M.C. 89, 103 (1948). It is also not unlawful for a common carrier to contract out part of its obligations with outside companies. *Free Time and Demurrage Charges on Export Cargo,* cited above, at pp. 213–214; *Banana Distributors, Inc.* v. *Grace Line, Inc.,* cited above at p. 622.

The record fails to demonstrate that Levatino, in using the facilities of Newark Dockside Warehouse rather than Grace's terminal at Sheds 138 and 140, was deprived of terminal services and facilities which differed significantly from those enjoyed by other importers who did not avail themselves of the option to engage the services of outside warehouse companies such as Newark Dockside. On the contrary, produce consigned to Levatino was carried by truck to Newark Dockside at Grace's expense and as far as can be seen from the evidence of record, received handling services similar to those provided other importers in Grace's Sheds 138 and 140. In fact, evidence of record indicates that this alternative storage and handling, if anything, were superior to similar operations at Sheds 138 and 140. One cannot conclude from these facts that Levatino was subjected to undue or unreasonable prejudice or disadvantage or unjust discrimination.[6] Indeed, as the record shows, Levatino renewed its arrangements with Newark Dockside and Grace for the 1967 season and apparently the idea of such alternative storage and terminal service appealed to numerous other importers who entered into similar arrangements utilizing the services of other warehouse companies at Grace's expense.

There is similarly no factual basis to the contention that Levatino suffered undue or unreasonable prejudice or unjust discrimination on the grounds that it was forced to fumigate at Newark Dockside because Grace would not permit it to fumigate at Sheds 138 or 140. Although Grace did in certain instances permit fumigation at its sheds, its policy was to confine fumigation to weekends because of the dangers associated with the process. Even in the two instances where this

[6]Levatino also contends that it suffered financial losses in the operation of Newark Dockside, a separate corporation. The record, however, indicates that Dockside almost broke even in 1966 and if anything enjoyed a modest profit in 1967.

was permitted, it was limited to certain shipments of melons and the costs of the fumigation were borne by the importers concerned, not by Grace.[7] In any event, the major costs of fumigation borne by Levatino at Newark Dockside involved fruit rather than melons and the record nowhere suggests that Grace at any time permitted fumigation of fruit at Sheds 138 or 140 or bore any costs associated therewith. Therefore, at worst, Grace provided space and pallets to two importers who paid for the costs of fumigating certain melons in two isolated instances whereas Levatino utilized the space and pallets provided by Newark Dockside when fumigating. There is no showing that Levatino suffered any disadvantage in using space provided by Newark Dockside, much less undue or unreasonable disadvantage.

The Alleged Unfiled Section 15 Agreement

Although not alleged in its complaint or in any of its pleadings, Levatino on brief contends that the various arrangements which Grace entered into with Levatino and Newark Dockside Warehouse were the type required to be filed with the Commission pursuant to section 15 of the Act and that by failing to file, Grace violated that law. This is a curious contention considering that, if valid, Levatino and its warehouse company would likewise be in violation of law and that at the time the agreements were executed, Levatino's previous counsel did not believe that they were required to be filed.

Grace replies that these agreements did not fix or regulate rates, give special rates, accommodations or other special privileges or advantages, or provide for an exclusive, preferential or cooperative working arrangement, or in any other manner fall within any of the seven categories enumerated in section 15. Although this particular issue is outside the scope of the pleadings, Grace has addressed itself to it and has not claimed that it has been deprived of an opportunity to make a proper defense. Under these circumstances, and considering that the facts have been developed and argued by the parties, it is proper to render a decision on the issue. *City of Portland* v. *Pacific Westbound Conference,* 5 F.M.B. 118, 129–130 (1956); *Stockton Port District* v. *Pacific Westbound Conference,* 9 F.M.C. 12, 33 (1965); *Kuhn* v. *Civil Aeronautics Board,* 183 F. 2d 839 (D.C. Cir. 1950).

Levatino cites *Volkswagenwerk* v. *FMC,* 390 U.S. 261 (1968) as authority for its proposition that "the Act was meant to apply to all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers

[7]Even if in these two instances the melons were fumigated on a Wednesday evening, as Levatino contends, that fact does not show that Levatino suffered as a result.

and transportation agencies." If such were the law, one wonders why Congress was so careful to set forth the requirement that the agreements must fit into one of seven specified categories. Thus, section 15 states that agreements subject to the Act are those:

> . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

Volkswagenwerk does not stand for the proposition that the seven categories have been eliminated from section 15. The Supreme Court merely held that section 15 was broad enough to cover an agreement among carriers and other persons subject to the Act assessing themselves for the payment of obligations under a labor contract, without a showing that the agreement had affected competition. The Court stated that the statute uses "expansive language" (390 U.S. at p. 273) but never held that section 15 was designed to apply to all agreements between carriers and other persons subject to the Act of whatever type. Even when referring to the legislative history of the Act which the Court held to evidence a Congressional intent to have the Commission scrutinize the "myriad" of agreements found in the maritime industry, the Court limited these to "restrictive" agreements (390 U.S. at p. 276) and certainly never held that an agreement between a carrier and a shipper was subject to the Act, contrary to Levatino's contention.

The Commission and the Supreme Court itself in a later case have made it perfectly clear that section 15 does not embrace every agreement between carriers and persons subject to the Act regardless of type. In *Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134, 140 (1966) the Commission stated:

> In order for the Commission to have jurisdiction, there are three necessary elements. There must be: 1. an agreement among 2. common carriers by water or other persons subject to the Act 3. to engage in anticompetitive or cooperative activity of the types specified in section 15 . . . [W]here there is an agreement between persons subject to the Act, but the cooperative conduct is not of the type specified in section 15, the agreement is also beyond the reach of our jurisdiction. *D. J. Roach, Inc.* v. *Albany Port District, et al.,* 5 F.M.B. 333 (1957).[8]

In *Federal Maritime Commission* v. *Seatrain Lines, Inc. et al.,* 8 SRR 20,908 (1973), the Supreme Court held that none of the seven catego-

[8]See also *Boston Shipping Assn.* v. *Port of Boston Marine Terminal,* 11 F.M.C. 1, 5 (1967); *Section 15 Inquiry,* 1 U.S.S.B. 121, 125 (1927).

ries enumerated in section 15 applied to agreements which provided for acquisition of assets or mergers without continuing responsibilities among the parties.

In view of the foregoing, it becomes necessary to determine whether the arrangement between Grace and Newark Dockside Warehouse, Inc. falls into one of the aforementioned seven categories. Grace admits that Newark Dockside, which appears to have been carrying on the business of furnishing a warehouse in connection with a common carrier by water, is an "other person subject to the Act." [9] Grace, contends, however, that the only categories specified by section 15 which have any relevancy to the subject agreement are those which "fix or regulate transportation rates," give "special rates, accommodations or other special privileges or advantages," or provide for an "exclusive, preferential, or cooperative working arrangement." Grace contends that none of these applies since the agreements were "simply means by which Grace Line procured some of the services which it provided every produce shipper and receiver as part of its freight tariff."

As noted above, the arrangement which Grace had with Newark Dockside in 1966 and 1967 provided Levatino and one other importer of produce with alternative storage and handling not significantly different from the storage and related services provided to importers who utilized Grace's regular terminal at Sheds 138 and 140. This alternative was open to any importer who elected to utilize the services of Newark Dockside, and in 1967 a number of similar elections were made by importers in connection with other warehouses. The cost of transferring produce from shipside to Newark Dockside was borned by Grace which paid to Newark Dockside (and other warehouses in 1967) the amount of 26 cents per box. Grace provided alternative storage space to any importer who desired to avoid the congestion at Sheds 138 and 140, at Grace's expense, in recognition of its obligations to provide adequate terminal facilities to all shippers using its services.

An arrangement such as the above does not fix rates, give "special rates, accommodations, or other special privileges or advantages," or constitute an "exclusive, preferential, or cooperative working arrangement" within the meaning of section 15. First, the election by an importer of alternative warehousing had no effect on the payment

[9] Of course, if Newark Dockside were merely the alter ego of the shipper Levatino and was created to avoid regulation, the corporate veil could be pierced, in which case section 15 would not apply for want of personal jurisdiction over one of the parties to the agreement. *Hong Kong Tonnage Ceiling Agreement*, cited above; *Agreement 9597 Between Flota Mercante G. C., et al.*, 12 F.M.C. 83, 101, 102 (1968). However, the record shows that Newark Dockside was a separate corporation formed by the Levatino interests which published its own tariff (which was not filed with the Commission as required by General Order 15, 46 CFR 533) and to some extent advertised for business.

of the line-haul rate published in Grace's tariff since the movement from shipside to the off-dock warehouse was at Grace's expense. Second, although storage accommodations at Newark Dockside might have been physically different from the facilities at Sheds 138 and 140, there was nothing "special" about them since they were open to any importer who wished to use them and notified Grace and Dockside of that election. Similarly, the off-dock accommodations conferred no "special privileges or advantages" for the same reason.[10]

Third, Grace's willingness to pay for the cost of moving produce to an off-dock warehouse in fulfillment of its common carrier obligations did not constitute an "exclusive, preferential, or cooperative working arrangement" within the meaning of section 15, again for the reason that any importer of produce was free to elect this alternative warehousing. Indeed, in the 1967 season so many importers chose alternative warehousing that Grace's Sheds 138 and 140 were left to handle only 10 to 15 percent of the total volume of incoming produce. An "exclusive, preferential, or cooperative working arrangement", according to the Supreme Court in the *Seatrain* case, cited above, is one which is similar to one of the six types of agreements previously enumerated in section 15.8 SRR at p. 20,913.[11] In this instance, the relevant type is that pertaining to "special rates, accommodations, or other privileges or advantages", as discussed above.

In short, these arrangements merely gave importers of produce the option of choosing substitute warehousing in lieu of Grace's Sheds 138 and 140, at Grace's expense, with no special privileges, preferences, or advantages provided by Grace pursuant thereto.

Levatino cites no authority for the proposition that a carrier, in contracting out part of its obligations, must file its agreement with the Commission pursuant to section 15, in the absence of special privileges, preferences, advantages, exclusions, or anything else which would bring it within one of the seven categories enumerated in section 15. In addition to *Volkswagenwerk*, the only cases cited which bear on section 15 are *City of Los Angeles* v. *Federal Maritime Commission*, 385 F. 2d 678 (D.C. Cir. 1967) and *Carnation Co.* v. *Pacific Westbound Conference*, 336 F. 2d 650 (9th Cir. 1964). *City of Los Angeles* involved a terminal agreement which, among other things, provided for a preferential berthing assignment with a special maximum-minimum payment provision. Such an arrangement is therefore "preferential" and "special", similar to a number of terminal

[10]A "special rate" or "accommodation", furthermore, is only a type of "special privilege or advantage", as section 15 is worded, since the statute specifically refers to "special rates, accommodations, or *other* special privileges or advantages." [Emphasis added]

[11]The Court also held that this last category in section 15 was meant as a "catchall" provision, "intended to summarize the type of agreements covered." 8 SRR at p. 20,913.

leasing agreements approved on the West Coast. See, e.g., *Agreements Nos. T-2108 and T-2108-A*, 12 F.M.C. 110 (1968); *Agreement No. T-4; Term. Lease Agree., Long Beach, Calif.*, 8 F.M.C. 521 (1965). The *Carnation* case cited by Levatino was reversed by the Supreme Court, *Carnation Co.* v. *Pacific Westbound*, 383 U.S. 213 (1966), and, in any event, involved the interrelationship between section 15 and the antitrust laws rather than any issue relevant to the present proceeding.

Accordingly, it is found and concluded that the arrangements by which Grace provided alternative storage to importers desiring to use space other than Grace's Sheds 138 and 140 were neither special, exclusive, nor preferential, conferred no special privileges or advantages, and did not fall under any of the seven categories enumerated in section 15.

The All Chilean Settlement

Levatino's final contention is that Grace entered into an unlawful settlement with importers of fruit and produce other than Levatino in satisfaction of formal complaints with which had been filed with the Federal Maritime Commission. By the terms of this settlement, Grace paid over to these importers the sum of $81,000, an act which Levatino contends was "discriminatory" and a "rebate", in violation of sections 16 and 17 of the Act.[12]

Grace replies that the settlement represented a prudent expenditure which saved Grace considerable amounts of money by terminating litigation. Grace, furthermore, contends that no rebating was involved since the lump sum settlement was negotiated by the parties' attorneys and was subsequently distributed to the various complainants in a manner decided upon by complainants and their counsel without the knowledge or participation of Grace.

Section 16 Second of the Act makes it unlawful for a common carrier by water:

> To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness, and validity generally. *General Discount Corp.* v. *Schram*, 47 F. Supp. 845 (D. Ct.

[12]Although Levatino alleges a violation of section 17, the gravamen of its complaint centers on "rebating" and on allegations relating to an "unjust device or unfair device or means", which pertain to section 16 Second, not section 17. Levatino also alleges that the settlement resulted in the destruction of its business because its reputation with Chilean suppliers was injured. Evidence of record refutes this contention but, in any event, it is only relevant to the issue of reparation which is not present in this proceeding, as noted earlier.

E.D. Mich. 1942); *Florida Trailer & Equipment Company* v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). Settlements, furthermore, are not ordinarily open to collateral attack by third parties. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (D. Ct. C.D. Calif. 1967), affirmed, sub. nom. *Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968). Levatino cites one authority for the proposition that the settlement was in reality a rebate and an "unjust or unfair device or means" to obtain transportation at less than the regular rates or charges, namely, *Hohenberg Brothers Co.* v. *Federal Maritime Commission*, 316 F. 2d 381 (D.C. Cir. 1963). That case, however, hardly provides support for Levatino's contention since it involved a shipper who demanded a rebate on the basis of a claim which the shipper knew to be false and both the carrier and the shipper had engaged in false billing in such a way that competitors were unaware of what had transpired. In the All Chilean case the record cleary indicates that complainants had filed their claims in good faith and had openly pursued the matter in a public forum, i.e., the Federal Maritime Commission, with no intention to conceal these activities from competitors.[13]

The essence of an "unjust or unfair device or means" prohibited by section 16 Second is an element of deception or concealment. In *Pacific Far East Lines-Alleged Rebates*, 11 F.M.C. 357, 364 (1968) the Commission stated:

> . . . [T]he unjust or unfair device or means must partake of some element of falsification, deception, fraud, or concealment . . .

In *Prince Line, Ltd.* v. *American Paper Exports, Inc.*, 55 F. 2d 1053, 1055 (2d Cir. 1932) Judge Learned Hand stated:

> The law did not forbid all concessions to a shipper; apparently it assumed that if these were above board, and known or ascertainable by competitors, the resulting jealousies and pressures upon the carrier would be corrective enough. But it did forbid the carrier to grant such favors, when accompanied by a concealment, and its command in that event was as absolute as though it had been unconditional.

Even a rebate is not held to be in violation of section 16 Second, unless it is founded on a false claim, etc. *Hohenberg Brothers Co.* v. *Federal Maritime Commission*, cited above, at p. 385, note 11.

The record is abundantly clear that the settlement which Grace entered into in the All Chilean case was free of any element of falsification, deception, fraud, or concealment. Unrefuted testimony of record demonstrates that Grace's decision to make a lump sum payment to complainants' counsel was a prudent decision designed to save Grace considerable amounts of money by terminating costly litigation. There

[13]Indeed, among the things that Levatino complains about is the fact that news of the All Chilean litigation was published in the New York Times and circulated in Chile.

is, furthermore, no evidence that Grace's decision was based upon a desire to discriminate against Levatino nor is there any evidence that the lump sum payment which Grace made to complainants' counsel in satisfaction of the complaints was designed by Grace to have some relationship to particular rates paid by complainants. On the contrary, the record shows that ultimate distribution of the lump sum to complainants was accomplished by complainants' counsel in a manner as to which Grace had no knowledge or control.

Accordingly, it is found and concluded that the settlement of the All Chilean case was an exercise of prudent managerial discretion by Grace, in no way constituting rebating or the use of an unjust or unfair device or means, in violation of section 16 Second of the Act.

ULTIMATE CONCLUSIONS

For a limited period of time between January and March 1967, in connection with seven voyages loading at Valparaiso, Chile, Grace unfairly treated Levatino and other shippers in the matter of space accommodations and subjected Levatino and other shippers to undue and unreasonable prejudice and disadvantage, in violation of sections 14 Fourth and 16 First of the Act, on account of Grace's failure to observe reasonable loading and booking procedures.

Grace did not subject Levatino to undue or unreasonable prejudice or disadvantage or unjustly discriminate against Levatino in the furnishing of terminal and fumigation facilities during the 1966 and 1967 Chilean fruit and produce seasons.

Grade did not enter into any agreements with warehouse companies during the 1966 and 1967 seasons which were of the type required to be filed with the Commission pursuant to section 15 of the Act.

Grace's settlement with complainants in the All Chilean case did not constitute rebating nor the use of an unjust or unfair device or means to allow shippers to obtain transportation for less than regular rates, in violation of section 16 Second of the Act, nor in any way violate section 17 of the Act.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
August 17, 1973.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–61

IN THE MATTER OF AGREEMENT NOS. T-2455/T-2553 BETWEEN PHILADELPHIA PORT CORPORATION AND DELAWARE RIVER TERMINAL AND STEVEDORING CO., INC./ LAVINO SHIPPING COMPANY, RESPECTIVELY

Agreement Nos. T-2455 and T-2553, as amended, are agreements subject to the provisions of section 15 of the Shipping Act, 1916.

Agreement Nos. T-2455 and T-2553, as amended, are true and complete copies of the understandings and/or arrangements between the parties.

The parties have implemented said agreements prior to receiving approval by the Commission pursuant to section 15.

The situation brought about by the subject lease agreements (i.e., the operation of all modern full-container ship handling facilities within a port by a single operator) is found to be so anticompetitive as to be detrimental to the commerce of the United States, in violation of section 15.

The intra-port anticompetitive aspects of the subject operations warrant disapproval by the Commission of Agreement No. T-2455 on the basis of undue or unreasonable preference or privilege to the Lavino interests to the detriment of other competing terminal operators/stevedores in violation of section 16 First.

Approval of the Agreement No. T-2455 would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act.

Agreement No. T-2455, as amended, is disapproved, subject to approval upon resubmission to the Commission if within 90 days of service of this report, no tenant or consortium thereof has submitted an acceptable bid for operation of the Tioga facilities as set forth herein.

Agreement No. T-2553, as amended, is approved.

Edward Schmeltzer and *Edward J. Sheppard IV* for Philadelphia Port Corporation, respondents.

Francis A. Scanlan and *Sean J. O'Callaghan* for Lavino Shipping Company and Delaware River Terminal & Stevedoring Co., Inc., respondents.

Martin J. McHugh and *James A. Leonard* for Atlantic & Gulf Stevedores, Inc., petitioners, and Independent Pier Company, intervenor.

Donald J. Brunner, Paul J. Kaller and *David Fisher,* Hearing Counsel.

REPORT

Decided 12–6–74

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett and Clarence Morse, *Commissioners*)*

This proceeding arises under a Commission Order of Investigation served December 5, 1972, naming Philadelphia Port Corporation (PPC), Lavino Shipping Co. (Lavino) and Delaware River Terminal & Stevedoring Co., Inc. (DRT&S), as respondents. Atlantic & Gulf Stevedores, Inc. (A&G) was made petitioner. Hearing Counsel participated in the proceeding. On February 21, 1973, the petition of Independent Pier Company, Inc. (Independent), for leave to intervene was granted. The investigation relates to lease agreements covering container facilities in the Port of Philadelphia (Port).

The Commission's Order of Investigation requires a determination of the following questions:

(1) Whether Agreements Nos. T-2455 and T-2553, as amended, are agreements subject to the provisions of section 15 of the Shipping Act, 1916 (hereinafter the Act);

(2) whether Agreements Nos. T-2455 and T-2553, as amended, are true and complete copies of the understandings and/or arrangements between the parties;

(3) whether the parties have in any manner implemented said agreements, understandings, or arrangements prior to receiving approval by the Commission pursuant to section 15;

(4) whether the agreements are unjustly discriminatory or unfair as between carriers or operate to the detriment of the commerce of the United States or are contrary to the public interest in violation of the standards of section 15;

(5) whether said agreements should be approved, disapproved, or modified pursuant to section 15;

(6) whether the agreements grant undue or unreasonable preference or advantage to D.R.T.&S. and/or Lavino or subject A&G or others to any undue or any unreasonable prejudice or disadvantage in violation of section 16 First; and

(7) whether the agreements establish or enforce unjust and unreasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property in violation of section 17.

Sixteen days of hearings were held in Philadelphia and in Washington. There were 23 witnesses, 133 exhibits, and 2,611 pages of testimony.

In his Initial Decision served January 17, 1974, Administrative Law Judge Stanley M. Levy concluded that the subject agreements, as amended, should be approved. In so doing, he found that the subject leases are agreements subject to section 15 of the Act, that the subject

*Commissioner George H. Hearn did not participate.

leases are true and complete copies of the understandings and/or arrangements between the parties, and that the subject leases do not violate the standards of sections 15, 16 First, and 17 of the Act, as set forth in the Order of Investigation. He did find, however, that the parties had implemented the agreements prior to obtaining approval from the Commission pursuant to section 15.

Exceptions and replies to exceptions were filed by all parties to the proceeding. Oral argument was held before the Commission on June 12, 1974.

THE PARTIES

PPC is a nonprofit, nonstock corporation whose Board of Directors represents the City of Philadelphia, the Chamber of Commerce of Greater Philadelphia, the Commonwealth of Pennsylvania, the Delaware River Port Authority, and the general public. PPC was formed in 1965 to be an intermediary party between the City of Philadelphia, which owns most of the marine terminals in Philadelphia, and private terminal operators who lease and operate such facilities. Marine terminal facilities in Philadelphia were leased to PPC pursuant to two leases with the City.

Lavino, a terminal operator, agent, and stevedoring company, is the lessee of the Packer container terminal. DRT&S, the terminal operating company which leases the Tioga container terminal, is a wholly-owned subsidiary of J. A. McCarthy which, in turn, is a wholly-owned subsidiary of Lavino. Lavino, McCarthy, and DRT&S have interlocking directorships and common officers and for all practical purposes comprise a single entity.

In addition to its leases at the Packer and Tioga terminals, hereinafter set forth in detail, the Lavino organization operates in the Port of Philadelphia 17 general cargo berths at various piers.

A&G is a wholly-owned subsidiary of John W. McGrath Corporation and operates seven general cargo berths in the Port.

Independent, a stevedore in the Port of Philadelphia since 1876, presently operates 13 general cargo berths, 4 of which are scheduled for demolition.

THE AGREEMENTS AND FACILITIES

Agreement No. T-2455 is a sublease between PPC and DRT&S for Container Berths 4 and 5 at the Tioga Marine Terminal. It was entered into on August 7, 1970, and filed with the Commission for approval pursuant to section 15 on September 21, 1970.

Agreement No. T-2553 is a sublease between PPC and Lavino for

Container Berths 4 and 5 at the Packer Avenue Marine Terminal. It was entered into on August 6, 1971, and filed with the Commission for approval pursuant to section 15 on August 27, 1971.

Interim rental agreements, intended to allow operation of the container berths as they might be completed in whole or in part, were entered into on April 2, 1971, and on June 29, 1971, for Tioga and Packer container berths, respectively. These were filed for Commission approval on August 27, 1971.

On December 28, 1971, amendments to both Agreements were filed with the Commission by PPC.

The Tioga I marine terminal was constructed on a fill site on the Delaware River. The facilities leased to DRT&S pursuant to Agreement T-2455 comprise only a portion of the Tioga terminal complex, and are referred to as "Tioga I (Berths 4 & 5)." [1] Tioga I (Berths 4 & 5) consists of the two upstream marginal berths totalling 1,272 feet in length together with approximately 22 acres of contiguous paved container handling and storage area, a Kocks container crane, crane rails and rail tracks, and was substantially completed as of August 1, 1972. An additional Kock's crane is being added to the terminal.

Packer II (Berths 4 & 5), like the Tioga I facility, is constructed on a fill site; and, like Tioga I, is part of a larger terminal complex (the Packer Avenue I & II marine terminals). Packer II (Berths 4 & 5) consists of two downstream marginal berths totalling 1,211 feet in length and storage area, a Kock's container crane, crane rails and rail tracks. An additional Kock's crane is being added to the terminal.

BACKGROUND

In reaching a determination of the issue of monopolization of all modern container facilities in the Port, it is necessary to develop the history of the advent of containerization in Philadelphia which culminated in the subject lease agreements.

From the late fifties to 1970, the Port of Philadelphia was in a state of decline. The marine terminal facilities of the Port were deteriorating. Shipping lines were abandoning the Port. The Port was falling behind its competitor ports in cargo tonnage and in the development of modern cargo-handling facilities. Diversion of cargo away from the Port to competing ports was increasing. The momentum of the container revolution was increasing and was threatening the Port with further loss of cargo. The Port seemed to be dying.

[1] The remaining Tioga facilities ("Tioga II") consist of 3 marginal berths, 2 slip berths (1 of which is a ro/ro berth), a 300,000 square-foot transit shed, and approximately 20 acres of paved storage area. These facilities are leased by Sea-Land Service, Inc., DRT&S and Thur-Chem Service, a division of DRT Industries, Inc.

This situation was a major reason for the formation of PPC in 1965.

PPC, under terms of a lease agreement with the City, dated May 24, 1966, as amended, assumed the administration of the City's existing leases with pier tenants and agreed to pay the City annual rentals through 1998 for the use of these facilities. This lease with the City is entitled the Consolidated Lease Agreement.

PPC entered into a separate agreement with the City with respect to the planning, constructing, extending, and improving of additional facilities. This agreement was executed on September 23, 1966, and is entitled the Port Improvements and Lease Agreement (Port Improvements Lease).

PPC is the lessee/sublessor of 38 different parcels of real estate pursuant to its leases with the City. These consist of both waterfront property, operated as marine terminals by the sublessees, and property near the water utilized as terminal backup areas.

PPC's tenancy of the Tioga I and Packer II terminals is derived from the Port Improvements Lease.

PPC receives income basically from three sources: (1) subsidies from the City of Philadelphia and the State of Pennsylvania; (2) rental income from piers and facilities other than Packer and Tioga; and (3) rental income from Packer and Tioga.

For all practical purposes rental income from other piers and facilities equals the debt service and retirement requirements on outstanding bond issues for those facilities (old debt).

Rental income from Packer and Tioga does not presently equal debt service and retirement requirements on outstanding bond issues for these facilities (new debt). To the extent that rental income is insufficient, the balance to meet debt service requirements is paid out of funds received from the City and State. This difference is denominated in this proceeding as a "subsidy", distinguished from "full formula rental" which is a rental equal to meet debt service requirements. Based on cargo forecasts and five-year lease renewal terms, rentals for the container terminals are estimated to reach "full formula rental" in the sixteenth year. Thereafter, rental income should exceed debt service requirements.

In 1967, PPC commissioned McKinsey & Co. to undertake a study as to the future needs and potential of the Port. That report was completed in September 1968. It indicated that the prospects for attracting container traffic to the Port were very poor and that the Port had already been bypassed. However, the report found that although the situation for Philadelphia was difficult, it could be redeemed if Philadelphia immediately began work on constructing modern containerized terminal facilities. It recommended that only

one new facility be developed and that the facility be an integrated container-breakbulk facility.

PPC, rejecting the limiting recommendation of the McKinsey Report, decided to proceed with the development of two integrated breakbulk-container terminals. They were to be located at Tioga and at Packer. PPC had commenced a search for interested tenants of these proposed facilities early in 1967. PPC's search period for tenants continued for approximately 20 months.

PPC called general public meetings on July 6, 1967, and February 13, 1969, to describe the proposed facilities and to discuss its views for the lease of the facilities, including proposed rental payments.

A major point of contention in this proceeding is whether the annual rental figures quoted at these meetings, i.e. $165,000 to $175,000 per berth plus the costs of ancillary facilities, were negotiable or nonnegotiable.

Protesting witnesses contend that they relied on the PPC memorandum distributed at the first meeting which stated in pertinent part that each prospective tenant must assure that it "is prepared to accept rental rates in the range discussed verbally". Protestants thus argue that the rentals quoted to all prospective tenants were thought by them to be nonnegotiable. However, the record in this proceeding discloses that the rents were never actually described as nonnegotiable.

PPC contends that its price policy is found in its letter of June 29, 1967, inviting the prospective tenants to the July 6, 1967 meeting. The following quotes are deemed to reflect their position:

> Since the facilities are now under construction, the Corporation is in a position to initiate discussion with prospective tenants.
>
> Rental rates will be set at a figure competitive with comparable facilities at other ports. There will be no bidding for facilities.

In addition to possible rental rates, the possibility of a consortium to operate the terminal was broached. Over the next several months, the Port renewed its efforts to interest various companies in leasing the terminal. The concept of a consortium was one of the major methods PPC considered to overcome the reluctance of individual terminal operators to consider leasing a terminal on their own behalf.

PPC proposed at the 1969 meeting that it might assume 51 percent of the interest and obligation of such a consortium in order to minimize the financial risk of the private operators involved. Once again, as in the July 1967 meeting, there was little interest among those people participating in renting the terminals. Shortly after the February 1969 meeting, A&G and Independent informed

PPC that a consortium did not appear feasible at that time.

At this point PPC, having no other companies interested in the terminals, devoted itself to negotiating the best possible terms it could from the only two companies with any interest in the terminals, i.e., Lavino and DRT&S. Negotiations over terms, conditions and rental rates continued over the next several months. These negotiations were protracted, and involved substantial controversy over lease terms and conditions. Eventually the two leases were executed, the Tioga lease on August 7, 1970, and the Packer lease on August 6, 1971.

Instinctive in the question raised by the Order of Investigation for determination is whether it is in the public interest to have the only two modern container terminals in the Port of Philadelphia in the hands of Lavino. In resolving this question, it is necessary to understand the events leading to the execution of the leases for those terminals.

PACKER NEGOTIATIONS

Prior to the formation of PPC, the City of Philadelphia (City or Philadelphia) began a program in the late 1950's to rehabilitate the Port when Piers 38–40 were modernized. Thereafter, the City began planning the Packer Avenue Terminal and first approached U.S. Lines. After U.S. Lines withdrew from the negotiations the City, in 1962, approached Lavino and ultimately leased it the facility known as Packer I (a breakbulk facility).

From the time the Packer negotiation commenced in the spring of 1962, numerous difficulties as to the physical configuration and conflicts with adjacent tenants were encountered. When agreement with an adjacent tenant for the construction of a new berth at the northern end of the terminal site could not be resolved, the City decided to extend the proposed facility further downstream. As a result of this change in plans, a right of first refusal was granted Lavino on any downstream berths which might be constructed later. The redesigned Packer I (upstream breakbulk berths) then became three marginal berths running a length of 1,823 feet and covering roughly 38 acres. When an agreement was finally executed in 1965 between the City and Lavino, the rental for Packer I came to $665,000 per year for a 15-year term. Although construction at Packer I began in 1965, it was not completed and operational until 1968 because further design problems created delays.

By this time PPC had been created and in late 1968 PPC informed Lavino that it intended to proceed with the development of the Packer Avenue extension (Packer II); that it would be designed for

containers; and that all other terminal operators in the Port were being advised that they could negotiate for this facility. On October 18, 1968, PPC asked Lavino whether it would be willing to enter into a consortium of terminal operators to operate Packer II and whether Lavino would be willing to waive its right of first refusal which was contained in its lease agreement with the City for Packer I. Lavino responded on November 1, 1968, stating it would be inclined to agree to enter into a consortium and that it would be willing to waive its right of first refusal for a period of five years.

Subsequently, a meeting was held with prospective tenants on February 13, 1969. Shortly thereafter, General Clark, Executive Director of PPC, informed Lavino that there was insufficient interest in the consortium on the part of the terminal operators and that PPC had decided to negotiate exclusively with Lavino regarding the Packer container terminal (Packer II). As a condition of leasing Packer II, PPC required that Lavino lease also the roll-on/roll-off berth at full formula rental of $325,000 per year. The lease for Packer II (container berths 4 and 5) for a 5-year term provided for a minimum annual rental of $100,000, with a $10 rental on all containers handled in excess of 10,000 per year with renewal options at higher rentals. The total guaranteed rental for Packer I and II is $1,090,000 per year when fully operational.

The lease for Packer II (Agreement No. T-2553) was executed between PPC and Lavino on August 6, 1971, and filed with the Commission August 27, 1971.

On June 29, 1971, PPC and Lavino entered into an interim rental agreement (submitted to the Commission on August 27, 1971) covering use of a new Kock's container crane at Packer II (Berths 4 & 5) upon its certification by the City, and of the limited facilities which were then, and soon would become available. The crane was certified for use on July 7, 1971, and the interim agreement became effective as of that date. Further facilities became available, and rental was increased accordingly on May 11, 1972, and then on July 21, 1972. The first container was handled there on July 9, 1971.

One of the issues raised in the proceeding was the effect of Lavino's right of first refusal to lease additional facilities to be constructed at the Packer Avenue Terminal. Those opposing the approval of the Agreements contend that this right gave Lavino such an undue advantage that it rendered fruitless any effort on their part to obtain a lease for the container berths and, hence, they did not make a strong effort to do so.

As set forth previously, this right of first refusal stemmed from an earlier lease between Lavino and the City of Philadelphia under

which Lavino leased other portions of the Packer complex. The right of first refusal allowed Lavino to lease the facility if it were willing to pay rental equal to that offered by any other prospective tenant.

Any prospective tenant could *outbid* Lavino by any minimal amount. If Lavino refused to meet the additional offer, the other operator would obtain the lease. The advantage to Lavino was that it could obtain the lease by merely meeting the other offer. The disadvantage to other parties was that they had to exceed Lavino.

In spite of PPC's letter of June 29, 1967, inviting prospective tenants to the July 6, 1967 meeting, which stated that the rental rates would be "set" and that there would be "no bidding", protestants' argument of undue advantage to Lavino insofar as the Packer Avenue facilities are concerned is well founded. The fact that Lavino would waive its right of first refusal for five years would not give a potential consortium of tenants much in the way of long-term prospects for operation of the Packer container berths.

TIOGA NEGOTIATIONS

In 1967, PPC proposed to develop a new terminal at Tioga. Whereupon DRT&S was approached by PPC and agreed to the cancellation of a leasehold interest in a 20-acre tract and to the sale in 1968 of a 25-acre parcel of land to PPC. These parcels were needed in order to develop the proposed new terminal at Tioga.

As a condition to DRT&S agreeing to cancel its leasehold interest and sell its 25-acre parcel, PPC granted DRT&S a right of first refusal on the two downstream breakbulk berths (Berths 1 and 2) to be constructed at Tioga. No right of first refusal was ever granted to DRT&S or anyone else with respect to the upstream container berths (Berths 4 and 5) at Tioga.

As previously stated, little interest was shown in leasing the Tioga facilities after either the 1967 or 1969 meetings. After several discussions with officials of DRT&S, PPC suggested that DRT&S should undertake to lease and operate the entire Tioga complex.

The terms of the proposed lease were to be a minimum guaranteed rental of $100,000 per year for the two container berths, plus a $10 charge for each container handled over 10,000 containers up to a maximum of $400,000 per year, on condition that DRT&S also agreed to take the lease on the adjacent breakbulk berths at full formula rental of approximately $700,000 per year. This resulted in a minimum rental of $806,250 per year and a maximum of approximately $1,100,000 per year for all the Tioga berths.

DRT&S and PPC also agreed that a condition of the lease would be that the terminal was to be designed so as to allow for a single terminal operator and stevedore, as this would result in significant operating cost advantages. DRT&S further agreed that if PPC received an offer from another potential tenant for the three up-stream (two container and one breakbulk) berths, DRT&S would stand aside. There were no other such prospective tenants.

Because of continuing construction delays, Luckenbach Steamship Co. withdrew from its partnership with DRT&S for operating Tioga in October 1969. This left DRT&S without an experienced stevedoring company, with the resultant loss of shipping contracts necessary to obtain business for Tioga. In February 1970, DRT&S commenced negotiations with International Terminal Operating Company, Inc. (ITO), as a potential partner or associate in leasing the Tioga Terminal, but in June 1970, ITO indicated that it was not prepared to enter into such an arrangement at that time. During these negotiations, General Clark of PPC was kept informed of progress as the leases for Tioga originally contained a clause allowing assignment to ITO should it change its position. In April 1970, DRT&S also approached Lavino with the aim of exploring acquisition by Lavino, but Lavino stated that it wished to await ITO's eventual decision. On June 10, 1970, a meeting was held between Robert P. Levy and Robert J. Tarr of DRT&S and Mr. Harry Galfand, City Director of Commerce and member of PPC Board of Directors, General Clark, and Irving Good, who was then the City's Deputy Director of Commerce, at which time ITO's decision and negotiations between DRT&S and Lavino were discussed. Although PPC raised no objection to the negotiations with Lavino, General Clark informed his Executive Committee that he doubted that it would be in the best interests of the Port to concentrate such a large proportion of its new facilities in the hands of one operator. He remained pessimistic about the possibility of any alternative, however, and advised the Committee there were no other interested tenants and the most important single factor was to generate commerce in the Port.

On June 15, 1970, a general agreement on terms of acquisition had been reached by DRT&S and Lavino. DRT&S orally kept PPC informed of its negotiations with Lavino, but neither Lavino nor DRT&S ever requested in writing a formal legal opinion from PPC whether the acquisition by Lavino presented any problems to PPC.

Throughout DRT&S's discussions with PPC regarding negotiations with Lavino, PPC never advised DRT&S that it had any objection to Lavino's taking over the Tioga Terminal. A letter of intent to lease Tioga was submitted to PPC by DRT&S on July 13, 1970. A meeting

between DRT&S and PPC was held August 3, 1970, at which time it was reported that virtually all matters relating to the acquisition of DRT&S by the Lavino subsidiary, J. A. McCarthy, Inc., had been settled and that a contract of sale had been entered.

On August 7, 1970, PPC, in its capacity as tenant from the City, entered a lease agreement with DRT&S for Tioga I (Berths 4 & 5) for a 5-year term with renewal options. The lease agreement (Agreement No. T-2455) was filed with the Commission on September 21, 1970.

Another lease covered Berths A (ro/ro), 1, 2 and 3 (breakbulk). Each lease contained a provision permitting the assignment of the lease to ITO in the event that negotiations between DRT&S and ITO were resumed and became successful at a later date. Each of the assignment clauses required that ITO would have to take over all the berths referred to in the other lease. In other words, ITO would not have the right to take over Berths 4 and 5 (container) without also taking over the other berths. This provision for assignment was retained in the September 17, 1970 settlement between DRT&S and McCarthy, at which time McCarthy purchased all of the DRT&S stock equipment. ITO never expressed any interest thereafter and Lavino consequently never assigned to ITO its rights under the lease.

Under the Tioga I (Berths 4 & 5) sublease (Agreement No. T-2455), PPC agreed to make available portions of the terminal for use by DRT&S as they might be completed in whole or in part. The sublease provides that the initial rental for such partial occupancy would be negotiated and agreed to in advance.

By letter of September 24, 1970, PPC advised DRT&S that the new Kock's container crane and a limited container storage area would become available in the near future. In its letter, PPC proposed that the incomplete facility would be leased to DRT&S at a rental rate computed at 25 percent of the applicable rental set forth in the Tioga sublease.

On April 2, 1971, PPC and DRT&S entered into an interim rental agreement (submitted to the Commission on August 27, 1971), for partial use of Tioga I (Berths 4 & 5), effective as of April 5, 1971, and on September 1, 1971, the rental was further increased as more facilities were completed. The first container was handled there on August 19, 1971.

On November 21, 1972, PPC and DRT&S agreed to delay commencement of the five-year term in Agreement No. T-2455 until August 1, 1973. The agreement also provided that DRT&S would begin paying the annual rental for Tioga I (Berths 4 & 5), retroactive to August 1, 1972.

Protestants contend that an "equalization clause" in the Tioga lease

for Berths A- 1-2-3 (ro/ro and breakbulk) absolutely prohibited, as a practical matter, PPC from giving consideration to the leasing of the container berths at Tioga to any tenant or group of tenants at less than standard rental. The full equalization clause states the following:

> If during the original term of this Lease, or any renewal or extension thereof, Lessor shall, directly or indirectly, lease, license, grant or otherwise permit any third party to use any marginal berth forming part of the Tioga Terminal for general cargo purposes on more favorable terms, conditions and rates than those herein specified or otherwise charged to Lessee with respect to the Demised Premises, including abatements, if any, then the terms, conditions and rates herein set forth or otherwise charged to Lessee shall be made to conform to such more favorable terms, conditions and rates; provided, however, that *this clause shall not apply* to any arrangement made by Lessor with PGW for the handling of liquefied natural gas or *to any arrangement made by Lessor for the use of the remaining berths of the Tioga Terminal primarily for the handling of containers.* Lessor will promptly disclose to the Lessee the facts representing such more favorable terms, conditions and rates. [Emphasis added.]

The equalization clause thus states clearly that its provisions are not applicalbe for any arrangement whereby the Tioga berths are leased primarily for the handling of containers, but was only effective should PPC desire to lease the additional Tioga berths for breakbulk use.

It is important to note, however, that the record indicates that General Clark of PPC *mistakenly believed* that the equalization clause *did* apply to the lease of the Tioga container berths to anyone other than DRT&S (Exhibit 17, p. 4). Operating under this misapprehension, PPC's officials only pursued negotiations for Tioga Berths 4 and 5 with DRT&S.

ADDITIONAL CONTAINER SITES AND FACILITIES

In determining the issue of monopoly raised in this proceeding it is appropriate to determine the position of PPC regarding additional container facilities in the Port, and whether potential sites exist for construction of additional facilities.

Various PPC witnesses testified that PPC is ready to develop a third container facility in addition to Tioga and Packer for any qualified tenant who is willing to commit itself with the lease.

A number of potential sites exist for development of a modern container terminal.[2] None of these sites is without problems. Some land acquisition would be necessary, as in the case of the Schuykill River and Reading Terminal and Northern Metal sites. Some turning basin problems exist, as in the case of the Schuykill River site. Some

[2]South Philadelphia—Penrose and Schuykill River sites. Mid Philadelphia—Area of piers 40-57 and Reading Terminal (Port Richmond) sites. North Philadelphia—Northern Metals site.

upstream navigational problems exist, as in the case of the Northern Metals site.

Unquestionably, Packer and Tioga are the most modern and efficient container facilities available in the Port. The record establishes, however, that there are at least three other container-handling terminals: Northern Metals, and across the river Camden Marine Terminal, and Holt, none of which has the modern equipment and capability (speed) for handling the larger fully-containerized vessels that exist at Packer and Tioga. In addition, deck containers aboard breakbulk vessels are handled at other general cargo piers. Of the approximately 34,700 containers handled in the Port in 1972, approximately 29,300 were handled at Packer and Tioga and approximately 5,400 at other facilities.

CONSORTIUM

Under the same terms and conditions as contained in the present leases, A&G would be willing to join a consortium to operate both Packer Avenue and Tioga berths 4 and 5; the entire Tioga terminal; or Tioga berths 4 and 5. A&G alone would undertake to operate Packer and Tioga berths 4 and 5; or Tioga berths 4 and 5, but not the entire Tioga terminal. Independent would join A&G, even if no other terminal operators in Philadelphia were willing to commit themselves to a consortium, to receive assignment of the present leases, under terms and conditions now applicable, for Packer Avenue and Tioga berths 4 and 5; or 4 and 5 at Tioga only.

Other terminal operators have indicated an interest in joining such a consortium. A&G believes it could form a consortium of at least five members.

In any event, only A&G has indicated any interest in forming a consortium for the operation of the entire Tioga terminal. All other expressions of possible interest have been limited to joining a consortium only to operate the container berths and not to take over the obligations of the breakbulk and ro/ro berths. A&G does not offer to operate the entire Tioga terminal alone.

As has been previously discussed in detail, whatever favorable terms for leasing the container berths were granted by PPC they were granted only on condition: that the lessee lease the third breakbulk and ro/ro berths at Tioga; the lessee lease the ro/ro berth at Packer. The terms and conditions set forth in the agreements, in effect, are a package.

The physical configuration of the terminals, primarily because of the location of the transit sheds for breakbulk operation and because of

the railroad track locations at each terminal, more particularly at Packer, make it very difficult, though not impossible, to operate either complex as separate breakbulk and container terminals. Thus, unless a consortium could be formed to operate an entire complex (breakbulk, ro/ro, and container berths), or a single operator were willing to take over the entire complex, the present operator would have to continue to operate because of lack of a viable alternative.

INITIAL DECISION

A. Jurisdiction

The Administrative Law Judge found that PPC was an "other person" subject to the Act by virtue of the fact that it still retained "control" over the use of the facilities subject to the leases in question. Citing the Commission's interpretive rule, published at 46 CFR 530.5(b)(2),[3] Judge Levy concluded that one aspect of the lease indicates that PPC retains oversight control over the use of the facilities, i.e., the "use" clauses of the two leases.[4] The "use" clauses, in light of the alleged anticompetitive effects that flow from the subject agreements, are found by the Administrative Law Judge to subject the agreements to the section 15 jurisdiction of the Commission.

Inasmuch as Lavino and DRT&S are undisputedly "other persons" subject to the Act, the agreements as such fall within the Commission's jurisdiction. The Commission must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objective and results of the agreement. Citing *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California,* 8 F.M.C. 521, 529 (1965).

Thus, PPC and the lessees are persons subject to the Act and the leases are such agreements as are required to be filed for approval in accordance with section 15 of the Act.

B. Implementation Prior to Approval

Section 15 requires that every person subject to the Act shall immediately file with the Commission a true copy of every agreement entered into with another person subject to the Act and makes it

[3]This rule includes as persons subject to the Act: Landlords, when not acting merely in the capacity of lessor of realty, but who maintain some control over lessee's rates or competitive practices either by unilateral action or by mutual agreement.

[4]Clause 4(a) of each lease, which provides:

. . . these facilities are primarily for the handling of containers moving in waterborne commerce through the Port of Philadelphia and other uses will be so controlled as not to interfere with this primary use. Lessor shall have the right of inspection and review of such other uses.

unlawful to carry out "in whole or in part, directly or indirectly", any such agreement before approved by the Commission.

The Administrative Law Judge rejected PPC's argument that even if the leases are subject to section 15, they have not been implemented since the only provisions of the leases which make them subject to that section are the "use" clauses. Since the use clauses have not been implemented, and PPC has taken no steps to enforce them, it claims that the leases, to the extent that they are subject to Commission jurisdiction, have not been implemented. Judge Levy found that once it is determined that a particular part requires that the agreement be filed pursuant to that section, the statute is clear that the entire agreement must be filed—not only the clause giving rise to jurisdiction. And that before approval, no part of that agreement may be implemented. Hence, since the record established that the terminals have been operated pursuant to the leases since 1971, PPC, Lavino and DRT&S have been in violation of the Act since then.

C. Sections 15, 16 First and 17

Section 15 requires that agreements between persons subject to the Act found to be unjustly discriminatory, unfair, detrimental to the commerce of the United States or contrary to the public interest be disapproved, cancelled or modified. Citing the standards enunciated in the decision of the U.S. Supreme Court in *FMC v. Svenska Amerika Linien,* 390 U.S. 238 (1968), Judge Levy concluded that while Lavino's alleged monopoly might otherwise be contrary to the public interest, there is evidence of record which establishes that a sufficient justification would fairly detract from a finding that the agreements are contrary to the public interest, hence rendering them approvable within the meaning of section 15. The Judge cites the following bases as the overriding justification for approval of what would otherwise be agreements, the terms of which are contrary to the public interest: (1) the beneficial growth in overall tonnage shipped through Philadelphia; (2) the influx of containership operators to the Packer and Tioga facilities contrary to the pessimistic attitudes of many observers; (3) the efficient and economical service currently being rendered at the two facilities; and (4) the conclusion that the operation of both terminals by Lavino resulted from the failure of any other operator to undertake the operational risks and commit the necessary working capital. Likewise, the Administrative Law Judge concludes that the record does not substantiate a finding that the agreements afforded any undue or unreasonable preference or privilege to DRT&S and/or Lavino or subject A&G or others to any undue or unreasonable prejudice or disadvantage in

violation of section 16 First. Judge Levy found that PPC has repeatedly indicated a willingness to construct a third container facility if a responsible operator were willing to enter into a letter of intent for the leasing of that facility upon mutually agreeable terms and that no such firm expression of interest in a third facility has been forthcoming from any party protesting the agreements in issue. Nor was it found that there had been a showing of the establishment of any unjust and unreasonable practices and regulations in the conduct of the terminal operations such as would be prohibited by section 17 of the Act. Contrary to any such showing, Judge Levy concludes that the preponderance of the evidence reveals that the conduct of Lavino and DRT&S in their operation of the container facilities has been fair and equitable, even to the extent of voluntarily offering an opportunity for open stevedoring to all interested and qualified parties at the Tioga facility.

In conclusion, the Administrative Law Judge pointed out the Commission's inherent power to review continuously any agreement filed with the Commission, and to withdraw prior approval where it is shown that the public interest is no longer being served.

EXCEPTIONS

Exceptions and replies were filed by all parties to the proceeding.

Lavino and DRT&S jointly except only to that portion of the Initial Decision which found that they have violated the Act by implementation of the subject agreements prior to Commission approval. In essence, they argue that the necessity to begin operations as soon as possible because of the expenses already incurred, the commitment to service container ships being urged to call at Philadelphia, and the fact that they did file amended agreements for temporary operating approval, to which even A&G did not object, should indicate the necessity to begin operations as soon as practical. They argue that there was no intent on the part of respondents to implement the agreements so as to violate section 15.

PPC excepts to the Judge's finding that it had implemented the agreements in violation of section 15 on the same basis as do Lavino and DRT&S. In addition, it excepts to the Judge's conclusion that it is an "other person" subject to the Act, stating that it falls within the Commission's exclusionary rule under 46 CFR 530.5(b)(2); i.e., that of a landlord who has relinquished all control over a terminal facility.

A&G and Independent in a joint memorandum except to all findings in the Initial Decision which approve the leases and allow the continued existence of what they contend to be the monopolistic

control by Lavino of all modern container terminal handling facilities in the Port of Philadelphia. In addition, A&G and Independent allege numerous instances in the Administrative Law Judge's conduct of the hearing which they contend evidence "substantial, material, and continuing bias and prejudgment which impaired his ability to function as an impartial judge of the facts and the law."

Specifically, A&G and Independent allege that Judge Levy erred in failing to consider the *potential* detriment accruing from the leases and in failing to consider the detriment to Lavino's *local* competition as a result of the alleged monopoly. They allege error for failure to find that the leases involved the *potential* of serious economic detriment to the Port, to the container lines serving the Port, to other terminal operators in the Port, to other ships' agents in the Port, to the taxpayers whose tax investment will not realize an adequate return, and to all business interests whose economic well-being depends upon a flourishing and competitive economy within the Port.

Furthermore, A&G and Independent allege that the finding of the Administrative Law Judge that PPC had accorded all port interests equal and fair treatment in its dealings with the Port community regarding the Packer and Tioga leases was in error. They further allege error in the finding that Lavino had made bona fide efforts to accommodate the interests of other stevedores in the Port regarding the operation of the container facilities. Finally, they allege error in various evidentiary and procedural matters in the conduct of the hearings resulting in recommended approval of the proposed lease agreements, and in the failure of the Administrative Law Judge to make specific recommendations for the protection of protestants and others similarly situated in the Port, to the end that such interests be accorded fair and equal access to the Port's publicly-built modern container terminal facilities.

The alleged procedural error on the part of Judge Levy involves charges of "advocacy" questioning of witnesses so as to elicit answers favorable to the respondents' position; failure to afford counsel for A&G and Independent, as well as Hearing Counsel, the opportunity to clarify testimony of witnesses favorable to protestants' position whose testimony had been changed somewhat after the "advocacy" questioning of the Judge had elicited answers contrary to their earlier testimony; and a general trend of bias in the manner in which the proceeding was conducted.

Hearing Counsel except to the Initial Decision to the extent that it recommended approval of the lease of the Tioga container facilities. Specifically, Hearing Counsel contend that the entire history surrounding the negotiations which led to the subject leases is clouded

with misunderstanding and misinformation to the extent that the protestants and others similarly situated were never afforded the same treatment by PPC as were Lavino and DRT&S. The resultant discrepancy between the rental costs offered the public and those granted Lavino and DRT&S, coupled with the "right of first refusal" on the Packer container berths held by Lavino by virtue of its lease for the Packer breakbulk berths and PPC's misinterpretation of the effect of the "equalization clause" contained in the lease for the Tioga breakbulk berths, evidence the fact that the Lavino interests had an undue advantage and/or preference in obtaining the rights to these facilities.

In addition, Hearing Counsel contend that the Administrative Law Judge had disregarded certain critical facts in arriving at his conclusion of the lack of harmful effects brought about by the Lavino monopoly; i.e., the lack of a timely available third potential container facility comparable to Packer or Tioga; the lack of existing facilities capable of conversion to full-container ship service in the scope of Packer or Tioga; and the wide operational disparity in terms of size between the facilities operated by the Lavino interests and all other facilities in the Port in terms of the percentage of scheduled sailings handled, scheduled *container* sailings handled, and total containers handled, all in the year 1972 (Exhibits, 91, 98 and 99, respectively). In addition, Hearing Counsel contend that a finding that there was no planned monopoly clearly overlooks the fact that the takeover of DRT&S by Lavino's subsidiary, J. A. McCarthy, Inc., was contingent upon the signing by DRT&S of the leases for the entire Tioga complex (Exhibit 90, paragraph 1(a)).

Furthermore, Hearing Counsel dispute the Judge's conclusion that the favorable competitive situation in container traffic now being enjoyed by Philadelphia as opposed to that of its major port competitors, New York and Baltimore, does not show that the Lavino monopoly is detrimental to the Port of Philadelphia. They contend that this conclusion clearly overlooks the point of issue in this proceeding, the lack of competition in container traffic among terminal operators/stevedores *within* the Port.

Hearing Counsel further contend that the speculative conclusion of Judge Levy that the three consortium proposals expounded by A&G are unworkable is clearly contrary to the record. Hearing Counsel offer as an alternative proposal that the Commission disapprove the Tioga lease only on the condition that the Commission approve, upon resubmission within 45 days of its final order in this proceeding, the lease between PPC and DRT&S for Tioga if during that period, no tenant or consortium of tenants makes itself available to PPC for assignment of the lease.

Finally, Hearing Counsel contend that the Administrative Law Judge committed reversible error in the handling of testimony of four witnesses during the proceeding, citing a verbatim account from the transcript of the testimony surrounding each allegation. These allegations of error for the most part deal with the refusal of Judge Levy to allow further questioning after he, the Administrative Law Judge, had questioned the witnesses following complete examination by the various counsel. Hearing Counsel contend that the Judge's questions opened new areas of testimony which they were not allowed to pursue.

Hearing Counsel and A&G and Independent requested oral argument, which was granted and, as previously noted, held before the Commission on June 12, 1974.

REPLIES TO EXCEPTIONS

Lavino and DRT&S filed a reply to the exceptions of protestants and Hearing Counsel. With regard to the allegations of error on the part of the Administrative Law Judge, the respondents contend that protestants and Hearing Counsel are substituting a personal attack on the presiding judge in lieu of their inability to produce on the record evidence of a harmful monopoly in the hands of Lavino. Respondents conversely argue that the presiding judge exhibited a totally unbiased and impartial demeanor throughout the proceeding.

In addition, respondents contend that the Administrative Law Judge correctly found that:

1. While all prospective terminal operators were offered full and fair opportunities to secure the subject leases, they refused to commit themselves;
2. There was no evidence of detrimental effect on competition within the port and that, should such ever arise, its cure lies in a commitment of Lavino's competitors to operate additional container facilities in the port;
3. The power of the Commission continuously to review and, if necessary, disapprove the subject leases provides a sufficient safeguard to any anticompetitive effects that may arise in the future;
4. The lease agreements have benefitted the port; and
5. The consortium proposals are illusory and would prove unworkable to the jeopardy of the recent competitive gains made by the port.

PPC replied to the exceptions of Hearing Counsel and the protestants on basically the same grounds as did Lavino and DRT&S. It concludes, however, with the contention that the real aim of A&G in the proceeding is "to attempt to use the Commission and the maritime laws as a tool to reverse an unfortunate business judgment made by A&G in the 1960's"; i.e., the decision not to pursue the leaseholds on either or both of the container facilities. In conclusion, they contend

that the Administrative Law Judge correctly found that the public benefits to be derived from the leases more than balance any potential detriment to competition flowing therefrom.

A&G and Independent replied to the exceptions of PPC and Lavino/DRT&S by a reiteration of their position in support of the Commission exercising jurisdiction over the subject lease agreements and over PPC as a person subject to the Act. Similarly, they argue that for the reasons set forth earlier, the subject lease agreements had been implemented prior to Commission approval.

Hearing Counsel's reply to exceptions is a restatement of the arguments of protestants and findings of the Administrative Law Judge with respect to the jurisdiction of the Commission over PPC and the subject lease agreements, as well as with respect to the implementation of the agreements prior to approval.

CONCLUSION

We concur with the findings of the Administrative Law Judge with regard to the issues of the jurisdiction of the Commission (1) over PPC as an "other person" subject to the Act, and (2) over the subject leases as being agreements required to be filed under section 15 of the Act.

Specifically, section 1 of the Act defines an "other person" as:

> . . . any person not included in the term "common carrier by water," carrying on the business of . . . furnishing wharfage, dockage, warehouse, or other terminal facilities in connection with a common carrier by water.

PPC clearly falls within this definition, albeit indirectly by leasing facilities to terminal operators. The fact that Lavino and DRT&S are "other persons" was not contested.

Having established that the subject leases are between persons subject to the Act, we must find that the two leases do in fact fall within one of the seven section 15 conditions. These terminal lease agreements, when looked upon separately, would clearly fall within the section 15 conditions. Further, when viewed together in light of the fact that they provide for lease of the only two truly modern container-handling facilities in the port, they clearly fall within the specific condition of section 15 which requires the filing of agreements "controlling, regulating, preventing, or destroying competition" (46 U.S.C. 814).

For these reasons, we adopt the specific findings of Judge Levy that PPC is an "other person" subject to the Act and that the involved leases are agreements subject to the requirements of section 15 of the Act.

Furthermore, we concur in the findings of the Administrative Law

Judge that the subject lease agreements have been implemented prior to Commission approval in violation of section 15. We therefore adopt those findings of the Administrative Law Judge set forth earlier in this Report under our discussion of his Initial Decision.

The key issue which remains to be resolved in this proceeding, therefore, is whether in fact implementation of these agreements has created a monopoly in the hands of Lavino in the operation of virtually all of the modern container handling facilities in the Port of Philadelphia. If so, we must then determine whether the existing monopoly is detrimental to the waterborne commerce of the United States or contrary to the public interest, or whether the monopoly operates as an undue or unreasonable preference or privilege to the Lavino interests to the detriment of other competing terminal operators and/or stevedores in the Port of Philadelphia. In addition, we must determine whether approval of the leases as presently being implemented would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act.

The record of the proceeding clearly substantiates a finding that a monopoly does in fact exist. Lavino and PPC have for the most part admitted as much. Those facilities which are capable of handling containers in quantities less than carried by full container ships are not viable competitors to Lavino. Nor does the promise of future full container handling terminals offer an alternative competitive situation to that which presently exists in Philadelphia. The record indicates that it would take at least three years to construct a competing facility, sufficient time to give Lavino an even greater stronghold on container traffic moving through the Port. In addition, it is uncertain that there is currently sufficient containerized traffic at the Port to warrant operation of a third container terminal.

The evidence does not, however, warrant a finding by the Commission that the monopolistic situation existing at the Port was the result of wrongdoing on the part of either PPC, Lavino or DRT&S. The Port needed a tenant for its container facilities. Lavino was the natural choice for the Packer facility because of its right of first refusal on the container berths. DRT&S needed an operating partner in order to operate the Tioga container berths, and kept PPC fully informed as to its negotiations with Lavino. The only fault arising under the negotiations lies in the mistaken belief by PPC that the equalization clause in DRT&S's lease of the breakbulk berths at Tioga was operative over any lease agreement to be negotiated for the Tioga container berths. It would therefore appear that PPC, though unintentionally, did limit its negotiations for the Tioga container berths to DRT&S, even though it appeared that there was some concern on its part that

by so doing they would be placing in the hands of one operator (Lavino) all modern container handling facilities within the Port.

We conclude that the present operation of the Packer and Tioga container facilities by Lavino is so anticompetitive as to be detrimental to the commerce of the United States in violation of section 15 of the Act. Furthermore, we hold that the intra-port anticompetitive aspects of the subject operations warrant disapproval by the Commission of Agreement No. T-2455 between PPC and DRT&S for the Tioga container berths, such disapproval being based upon the undue or unreasonable preference or privilege to the Lavino interests to the detriment of other competing terminal operators/stevedores in violation of section 16 First of the Act. Finally, we conclude that Agreement No. T-2455 must be disapproved in that approval of that agreement in concert with Agreement No. T-2553 (Packer) would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act.

We approve Agreement No. T-2553, for by so doing, we do not deprive Lavino of all of its container operations at the Port, but allow it to retain its leasehold on what the record indicates is the most utilized modern container facility at the Port, namely Packer.

Our disapproval of Agreement No. T-2455 is conditional, however. The Port is hereby directed to solicit bids for operation of the entire Tioga I complex, both breakbulk and container. These bids will be solicited on the basis of separate offers for the breakbulk and for the container facilities. The Port in its discretion, subject of course to Commission approval, may select a new tenant to operate the entire Tioga complex, or it may continue its present lease with DRT&S for the Tioga breakbulk berths and select the most advantageous proposal for operation of the Tioga container berths from among those qualified bids. Lavino or any of its subsidiaries or affiliates will not, of course, be qualified to bid on the container facility. Should the Port determine after examination of all qualified bids that the present lease between PPC and DRT&S for the Tioga breakbulk berths is more advantageous to its operations, it may continue that lease and enter into a new agreement with that bidder whose proposal for lease of the Tioga container berths is the most advantageous to the Port. Should the Port determine after examination of all qualified bids that it would be more advantageous to enter into a new agreement for operation of the entire Tioga complex by an entirely new operator or consortium of operators, it may accept this bid and file the subsequent agreement with the Commission for approval. No bid has to be accepted, the rental terms of which are less in amount than those currently found in Agreement No. T-2455. If, within 90 days of the service of this

Report, no bid acceptable to both PPC and the Commission has been received from a new tenant or consortium thereof, PPC shall resubmit Agreement No. T-2455 for Commission approval pursuant to section 15 of the Act. Acceptance or rejection of bids for operation of the Tioga facility shall, of course, be subject to Commission review as to the misuse by PPC of the discretionary power granted herein.

There is one further matter which requires our attention. Various allegations have been made by the Commission's Hearing Counsel and by counsel for A&G and Independent regarding possible bias and error on the part of the Administrative Law Judge. Subsequently, they have set forth several instances which they contend amount to reversible error by the Judge. The charges made were based upon rulings made by the Administrative Law Judge involving the issues of the unjustifiable monopoly, unreasonable privilege or advantage, and unreasonable practices.

Inasmuch as our decision in this proceeding reverses Judge Levy on these issues, no useful purpose would be served in reversing and remanding on the merits of these allegations. It suffices to say, however, that when new matter is raised through examination of witnesses, reasonable opportunity to cross-examine must be provided.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-61

IN THE MATTER OF AGREEMENT NOS. T-2455/T-2553
BETWEEN PHILADELPHIA PORT CORPORATION AND DELAWARE
RIVER TERMINAL AND STEVEDORING CO., INC./
LAVINO SHIPPING COMPANY, RESPECTIVELY

ORDER

12/23/74

The Federal Maritime Commission has on December 20, 1974, served its Report in the subject proceeding, which we hereby incorporate herein, in which we found:

1. That the Agreements therein are subject to the provisions of section 15 of the Shipping Act, 1916;

2. That said Agreements have been implemented prior to receiving approval by the Commission pursuant to section 15;

3. That the operation of all modern full-container ship handling facilities within a port by a single operator, as brought about by the subject lease agreements, is found to be so anticompetitive as to be detrimental to the commerce of the United States, in violation of section 15;

4. That the intra-port anticompetitive aspects of the subject operations warrant disapproval by the Commission of Agreement No. T-2455 on the basis of undue or unreasonable preference or privilege to the Lavino interests to the detriment of other competing terminal operators/stevedores in violation of section 16 First of the Shipping Act, 1916;

5. That approval of the Agreement No. T-2455 would establish or enforce unjust or unreasonable practices in violation of section 17 of the Shipping Act, 1916;

6. That Agreement No. T-2455, as amended, be disapproved, subject to approval upon resubmission to the Commission if within 90 days of service of this Report, no tenant or consortium thereof has submitted an acceptable bid for operation of the Tioga facilities as set forth herein; and

7. That Agreement No. T-2553, as amended, be approved.

Therefore, for the reasons enunciated in said Report,

It is ordered, That pursuant to sections 15, 16, and 17, Agreement No. T-2455, as amended, be disapproved, subject to the conditions set forth above.

It is further ordered, That pursuant to section 15, Agreement No. T-2553 as amended, be approved.

It is further ordered, That in the public interest to assure continued operations of container facilities in Philadelphia the effective date of disapproval of Agreement No. T-2455, as amended, be stayed for a 90-day period from service of the subject Report in order to meet the conditions set forth therein.

It is further ordered, That Respondent Philadelphia Port Corporation shall submit to the Commission on or before January 22, 1975, a plan and schedule indicating how it intends to comply with paragraph 6 hereinabove. If Philadelphia Port Corporation fails to submit such a schedule in a timely fashion, the stay of this order, pursuant to the immediate preceding paragraph will be immediately vacated on January 23, 1975.

Finally, it is ordered, That the plan and schedule of Philadelphia Port Corporation and the effectuation thereof shall be subject to Commission surveillance and may be subject to further Commission Order as conditions warrant.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

Charges assessed and conditions imposed by respondent upon all stevedores operating at its leased terminal facility do not constitute a modification to an approved section 15 agreement for which further Commission approval is required.

No unreasonable preference or privilege as contemplated by section 16 First of the Shipping Act, 1916, resulted from the imposition by respondent of charges and conditions on all stevedores, including respondent's subsidiary.

The relationship between a terminal operator and a wholly-owned stevedore does not *ipso facto* render charges assessed and conditions imposed equally on all stevedores as unduly anticompetitive or discriminatory, especially in the absence of proof of actual damage to the complainant.

Assessment of charges and imposition of conditions upon stevedores found not to be reasonably related to the economic and commercial benefits derived by the stevedores, and thus to be an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

Failure to file new assessed charges and imposed conditions in terminal tariff found to be an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

The matter is remanded to the Administrative Law Judge for resolution of the sole issue of achieving a proper allocation formula with regard to actual benefits derived by stevedores from use of terminal facilities and for arriving at a proper charge against stevedores based thereon.

Edward S. Bagley for Baton Rouge Marine Contractors, Inc.
Edward Schmeltzer and *E.J. Sheppard IV* for Cargill, Incorporated.
Donald J. Brunner, Margot Mazeau and *Patricia E. Byrne* as Hearing Counsel.

REPORT

Decided Jan 3 1975

BY THE COMMISSION: (Helen Delich Bentley, Chairman, and James V. Day, Vice Chairman. Ashton C. Barrett and Clarence Morse,

Commissioners, concurring and dissenting. George H. Hearn, Commissioner, concurring and dissenting.)

I. PROCEEDING

This proceeding arises from a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA or complainant) on March 29, 1971, alleging that Cargill, Inc. (Cargill or respondent) has violated and continues to violate sections 15, 16, and 17, Shipping Act, 1916 (the Act), by unilaterally modifying a lease agreement between Cargill and the Greater Baton Rouge Port Commission (Port), which agreement had previously been approved by the Commission. The subject modification allegedly imposed unlawful charges and conditions upon stevedores conducting business at the marine grain elevator at Port Allen (Baton Rouge), Louisiana, and was not filed with the Commission. BARMA seeks a cease and desist order.

Cargill denies any modification of the lease agreement, unilateral or otherwise, or that it has violated the Act. Respondent admits to having informed BARMA that it would not deliver grain from the elevator to any vessel employing a stevedore who had not agreed to certain proposed charges and conditions, but maintains that such action was lawful, proper and within the terms of its lease agreement. Hearing Counsel intervened in the proceeding.

Hearings were held in New Orleans, Louisiana on November 30 and December 1, 2, and 3, 1971, and on April 24 and 25, 1972, in Washington, D.C.

In his Initial Decision served December 1, 1972, Administrative Law Judge Ashbrook P. Bryant concluded that the charges assessed and the conditions imposed by Cargill upon the stevedores as a prerequisite to loading grain on vessels at Port Allen constitute a modification of the lease agreement between Cargill and the Port previously approved by the Federal Maritime Commission, and the execution of that modification without prior filing with and approval by the Commission violates section 15 of the Act. He also found that the charges and conditions imposed by Cargill, with minor exceptions, were not reasonably related to the economic or commercial benefit of the stevedore from the use of facilities and services provided by the terminal, and thus constitute unjust and unreasonable practices violative of section 17 of the Act. Accordingly, the Administrative Law Judge found that Cargill should cease and desist from assessing, charging and collecting the fees and charges and imposing the regulations found to be unlawful.

As to the possible section 16 violations, the Administrative Law Judge found that the relationship between a terminal operator and a

wholly-owned stevedore does not in and of itself render charges assessed and conditions imposed equally on all stevedores unlawful as unduly anti-competitive and discriminatory, especially in the absence of proof of actual damage to the complainant. While a substantial competitive advantage may accrue to the parent-subsidiary combination from the assessment of charges and imposition of conditions on all stevedores, including the subsidiary, no unreasonable preference or privilege of the type contemplated by section 16 First of the Act has been shown.

BARMA filed exceptions to the Initial Decision on December 15, 1972, as did Cargill and Hearing Counsel on December 18, 1972. All parties filed replies to exceptions on January 12, 1973. Oral argument was held on March 7, 1973.

II. FACTS

Parties

BARMA, a Louisiana corporate entity, is equally held by four contracting stevedores and/or steamship agents, T. Smith & Son, Inc., Strachan Shipping Company, Atlantic & Gulf Stevedores, Inc. and Texas Transport and Terminal Co., Inc.

Cargill is incorporated in Delaware and with home offices located in Minneapolis, Minnesota. It is engaged in selling, loading, unloading, storing and delivering grain and related commodities, exporting much of the grain through 12 terminals it operates, including the Baton Rouge facility. At Baton Rouge, Cargill is engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water.

Rogers Terminal and Shipping Corporation (Rogers) is a wholly-owned subsidiary of Cargill and operates as a general cargo and grain stevedore company/steamship agent with operative offices at Baton Rouge.

The Port owns the grain elevator herein discussed, and is a regulatory agency of the State of Louisiana. The Port is engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water.

History

In 1955, the Port leased the grain elevator and wharf at Baton Rouge to Cargill. The four stevedore firms mentioned earlier, following encouragement by the Port, and with the assurances of Cargill that the elevator would remain open competitively, formed

BARMA to compete for stevedoring operations at the grain facility.

In August 1956, Cargill replaced BARMA with Rogers, its subsidiary, as sole stevedore on the grounds that BARMA's performance was deficient. Complainant was advised that it was no longer welcome at the elevator.

In March 1957, the Port and Cargill agreed that Rogers should be the exclusive stevedore at the elevator. BARMA refused to withdraw and protested the exclusive stevedore arrangement which was provided for in the lease which the Port and Cargill filed with the Federal Maritime Board (Board) for approval.[1]

While the Board approved the original lease (Agreement No. 8225), the amendment (Agreement No. 8225–1) was found to "create in Cargill a monopoly over activities which take place exclusively on the vessels and not on terminal property" and to be "detrimental to the commerce of the United States", and that its operation would constitute an unjust and unreasonable practice relating to the receiving, handling and storing of property in violation of section 17 of the Act.[2] The amendment was not approved. Accordingly, BARMA continued to operate as stevedore at the terminal on an "open" basis.

The lease

The lease, a comprehensive and detailed contract covering waterfront land and improvements, is for a term of 20 years from September 7, 1955 to September 6, 1975, with options to renew under certain conditions for additional periods of 10 years each. Cargill has the right to "have, hold, occupy, possess and enjoy the leased premises" during the term and any renewal periods "to the exclusion of all others save and except those using said leased premises with the consent, express or implied, of lessee." The obligations of both lessor and lessee with respect to repairs, renewals, maintenance, replacement and restoration of the premises not reimbursed through insurance proceeds are specified within the agreement, and the rights and obligations of the parties are to be integrated with the overall operations of the Port insofar as is possible without violating the other provisions of the lease. The leased facilities are to be maintained throughout the period of the lease, or any extended period thereof, as a public port facility.

[1]See *Agreements Nos. 8225 and 8225–1*, 5 F.M.B. 648 (1959). The further agreement [8225–1] was as follows: Cargill further is required to and agrees to provide and furnish stevedoring services to vessels loading or unloading at the wharf, it being recognized that vessels loading or unloading should be integrated into the overall elevator operations so as to provide efficient service, both to such vessels and to persons depositing commodities into the elevator. It is to be a reasonable rule and regulation in the operation of the wharf which is part of the leased property, for Cargill to condition the loading or unloading of a vessel upon the requirement that Cargill's integrated stevedoring service be used by such vessels.

[2]*Agreements Nos. 8225 and 8225–1, supra* note 1.

Lessee agrees that it will establish and enforce reasonable rules and regulations for the operation of the facility and will maintain and operate it in an efficient manner and will accept grain without "discrimination between persons desiring to avail themselves of such facilities, as to rates and services." To the extent feasible, lessee agrees to give "preference to this grain elevator over other grain elevators operated by lessee in the Gulf area." Further, lessee agrees to publish rates and charges for the handling and storage of grain competitive to those for similar services at New Orleans and other competitive Gulf ports so as to insure a schedule of rates, rules and regulations competitive and comparable to those maintained in New Orleans and other competitive Gulf ports.

So far as may be lawful, the Port agrees to give lessee "preferential privileges in and to the docks, wharves, roads, and railroad facilities necessary or convenient to the efficient and economical operation of the leased premises and the business conducted therein and thereon." The Port agrees to give Cargill the most favorable rates for services and facilities granted to any other person. The Port's rates shall be "competitive with, and not greater than rates for similar services and privileges charged at other Gulf ports, including but not limited to New Orleans, Louisiana; Galveston and Houston, Texas." Nothing contained in the lease shall be construed as prohibiting the Port from charging normal and competitive dockage fees chargeable to ships using the facilities, but wharfage charges chargeable against the grain shall not be charged by the Port. Cargill shall have the exclusive right to operate a public grain elevator "as defined by law" within the Port area and shall have right of first refusal on any additional grain storage and handling facilities which the Port may construct in the event that the present facilities become inadequate, "on such terms and for such payments as the Port is prepared to make to responsible third persons in good faith."

As before stated, the Board refused to approve the Cargill/Rogers exclusive stevedoring arrangement at Baton Rouge. This decision was appealed; and the Court of Appeals affirmed the Board's decision.[3]

In its report, the Board had described in some detail the relationships among vessel, master, stevedore, and elevator.

> The relation between vessel and stevedore involves trust, reliance, and dependence on the skill, reliability, and efficiency of the stevedore in the performance of an important ship-operating function. Under the form of grain charter used in the Gulf, including Baton Rouge, the vessel owner appoints the stevedore, except where by special provision the right of appointing is given the charterer. In all instances, the decision on all matters of loading rests with the master, the vessel and her owners are legally and

[3] See *Greater Baton Rouge Port Commission* v. *United States*, 287 F.2d 86 (1961), cert. den. 368 U.S. 985.

contractually responsible for the proper loading and seaworthiness of the vessel, and they pay the cost of loading.

There is a complete separation of the function of the elevator in delivering grain and that of the vessel in receiving and stowing it. There is no physical connection between vessel and elevator except mooring and guide lines. The latter hold the spout which discharges the grain into the hatch under control of the stevedore. The elevator has completed delivery when the grain flows out of the spout. All remaining functions are those of the stevedore, who in effect takes over the ship's operation for the time being. The elevator personnel perform no function on the vessel; the stevedore personnel perform no services in the elevator or on the wharf. There is, of course, necessity for cooperation between the two groups as the stevedores must signal terminal personnel in order to control the flow of grain. (p. 651)

The division of responsibility and authority as defined by the Court and the Board remain largely unaltered and are presently operative at Port Allen.

In *New Orleans Steamship Assn.* v. *Bunge, Etc.*, 8 F.M.C. 687 (1965), an exclusive stevedoring arrangement was not ruled on by the Commission because it was determined that Bunge was not "an other person subject to the Act", and hence we had no jurisdiction. Subsequent to that decision, the Department of Justice, Antitrust Division, instituted an investigation into the exclusive stevedoring at Gulf grain terminals. Consent decrees were entered against several elevators, including Bunge and another elevator located on the Mississippi River below the Port of Baton Rouge, whereby the defendant elevator owners were enjoined and restrained from imposing "any requirement or understanding that stevedoring services of any particular person be utilized" at the elevators by vessels loading there and from "denying or otherwise restricting any person access to and the use of the facilities at the terminal or dock of an elevator in order to provide stevedoring services for loading at the elevator."

The injunctions did not, however, prohibit the elevator operator from establishing reasonable regulations for access and use of the facilities if such regulations were applicable to all.

In 1966 Cargill was served with a civil investigation demanded by the Justice Department concerning its elevator at Port Arthur, Texas, and had not, in the interim period, imposed any restrictions on the stevedores at Baton Rouge.

Cargill feels that marine terminal elevators provide benefits to stevedores for which the elevator should be compensated. In 1967, when the Houston elevator opened, Cargill instituted the stevedore agreement which has been in existence since that time. All of BARMA's members except T. Smith & Son, Inc., which does not operate at Houston, signed the agreement without complaint.

In 1970, four other Louisiana grain terminals instituted charges and

agreements similar to the one at issue. Consequently, Cargill, in a letter of February 4, 1971, and revised February 10, 1971, informed BARMA and other stevedores using its Baton Rouge facility of certain conditions the stevedores must meet to use elevators. The basic agreement now in force provides as follows:

> The stevedore will provide sufficient crews of longshoremen so that the elevator may operate at capacity. The stevedore will pay $100.00 per hour if he fails to provide enough longshoremen. The stevedore will post a $2,000.00 deposit to secure this obligation, and Cargill will pay interest on the deposit.
>
> The stevedore will pay 5¢ per ton of grain handled for services and facilities provided to it by Cargill, and will pay $50.00 per vessel to defray the cost of cleaning the grain dock. The stevedore will post a $1,500.00 deposit to secure these obligations.
>
> The stevedore will adhere to federal equal employment guidelines and regulations.
>
> The stevedore will use utmost care in his operations, will hold Cargill harmless from damages caused by the stevedore's operations, and will provide evidence of adequate liability insurance coverage by companies acceptable to Cargill.
>
> The stevedore will provide adequate supervision for his operations, which will be performed in a "workmanlike" manner.

BARMA protested the agreement, but was advised by Cargill that no vessels would be loaded unless the agreement was executed. Accordingly, BARMA signed the agreement under protest. BARMA and Rogers thereafter raised their rates to compensate for the charges imposed by Cargill.

Cargill's initial charges were 5¢ a ton. During the course of the hearings in this case, on December 17, 1971, Cargill advised the stevedores that the 5¢ charge would be increased to 8¢ per long ton, "effective 30 days after the date of the Federal Maritime Commission's decision in Docket 71-29. . . ."

By letter of February 13, 1971, the Port protested the proposed increase and requested Cargill to cancel or postpone the increase until it could be considered and legally resolved. While the Port did not intervene in the proceeding, its executive director testified that the Port considers Cargill's action in imposing "charges on vessels utilizing the facility or the stevedores hired by them to serve those vessels" as a violation of the lease agreement, "detrimental to the Port of Greater Baton Rouge", and tending to reestablish Rogers as an exclusive stevedore through the manipulation of the access charges and stevedoring rates. Since there are no access charges at the Public Grain Elevator in New Orleans, which is the primary competitor of the Baton Rouge Grain Elevator, the Port Commission fears that the Cargill charges against stevedores, which are being passed on to the vessel, may render the Port noncompetitive; however, there is no apparent substantiation of this fear.

III. INITIAL DECISION

The Administrative Law Judge initially looked to the lawfulness of the charges and conditions imposed by Cargill. Cargill's position, as earlier stated, is that its actions are, within the authority and powers granted to it under the lease, completely legal and no modification of its section 15 agreement has been effected.

BARMA and Hearing Counsel urge that Agreement No. 8225 has been unlawfully modified by Cargill's unilateral action. The Administrative Law Judge, in his consideration of the matter, reviewing the lease arrangement at Baton Rouge, found "reasonable doubt" that the original lease intended to and did clothe Cargill with authority to impose the charges and conditions it did.[4] In its brief, Cargill further contends that, *arguendo,* even if its actions resulted in a modification of the agreement, since that modification was unilateral (the Port having no part in the assessment of charges and conditions upon the stevedores) and not "joint or cooperative" as envisioned by section 15, such modification would not be subject to section 15 and thus not need Commission approval.

Hearing Counsel point out that there is no precise precedent for a unilateral modification within the purview of section 15, but that since section 15 agreements are not private contracts between private parties, the Commission has the duty to oversee such arrangements where they affect the maritime industry. Hearing Counsel argue that the fact that Cargill acted alone in imposing the charges and conditions does not divest the Commission of its authority to consider the import of the agreement.

The Administrative Law Judge determined that the Act does not permit substantial changes in the effect of a section 15 agreement to be taken lightly. Since the Act is remedial in this nature, any doubt should be resolved in favor of the applicability of section 15, and any modification of such an agreement except in unusually clear cases should be scrutinized by the Commission.

The Administrative Law Judge further observed that the modification did introduce an element into the agreement which was not contemplated at the time the lease was negotiated and, accordingly, ruled that the charges and conditions contained in Cargill's letters of February 10 and December 17, 1971, constituted a

[4]Cargill explains that the lease gives it only "preferential" and not exclusive use of "the docks, wharves, roads, etc." only because of a "peculiarity" of Louisiana law which prohibits a state body from "leasing" certain waterfront facilities, such as docks, to any person. Cargill asserts that in order to comply with this law and still give terminal operators and others a maximum degree of control over "premisses for which they are paying", the Port Commission has adopted a concept of "privileged use", which, according to Cargill, in every material respect is the same as a full lease.

modification of an approved agreement requiring section 15 approval.

The Administrative Law Judge, in viewing the Cargill/Rogers relationship found a situation "fraught with potential abuse", but found no specific evidence on the record to substantiate charges of undue economic disadvantage to BARMA or other stevedores and shippers. He found little doubt that a substantial competitive and economic advantage would accrue to the Cargill/Rogers arrangement from the imposition of the charges herein considered, but, said the Administrative Law Judge, it does not follow *ipso facto* that the charges and conditions are unlawful since the charges and conditions are imposed equally on all stevedores.[5] Accordingly, while the Administrative Law Judge felt the potential anticompetitive effect flowing from the parent-subsidiary relationship should be reason enough to closely scrutinize its charges and conditions for reasonableness, he found no proof of actual damage to BARMA and no unreasonable preference or prejudice resulting simply from the Cargill/Rogers relationship.[6]

As the "crux" of the case, the Administrative Law Judge addressed himself to the question as to whether the charges and conditions imposed on stevedores by Cargill as a prerequisite to doing business at Baton Rouge may be fairly and directly related to benefits derived from the use of the terminals, facilities and services performed by Cargill.

The Administrative Law Judge felt that no violence would be done to generally accepted principals of fairness if such were the case to require BARMA and others to pay for the benefits they receive.

Cargill maintains that the charges and conditions are fair. BARMA and Hearing Counsel contend that the facilities and services for which charges and conditions are imposed are not primarily for the benefit of stevedores, and hence, with a minor exception, are unfair and unreasonable.

The Administrative Law Judge then proceeded to discuss the Edwards-Differding Formula and the later Freas Formula used for the determination and allocation of costs in marine terminals in relation to the testimony of Philip E. Linnekin, Cargill's expert witness. Essentially, the Administrative Law Judge, in sifting down the testimony, came to the conclusion that the applicability of the Freas Formula can be affected by the judgment of a trained analyst, by agreement, and/or by custom and usage. To apply the Freas Formula, which

[5]Citing *Pittston Stevedoring Corp.* v. *New Haven Terminal Inc.*, 13 F.M.C. 33, 35 (1969).

[6]Citing *Lake Charles Harbor and Term. Dist.* v. *Port of Beaumont*, 12 F.M.C. 244, 248 (1969); *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538 (1936); *Port of New York Authority* v. *AB Svenska, et al.*, 4 F.M.B. 202 (1953).

historically was applied to general cargo terminals allocating costs between vessel and cargo, to cargo and stevedores, while novel, does produce certain workable data, which the Administrative Law Judge referenced at length in his Initial Decision. Applying that data to formulate charges and conditions and thereafter imposing these charges and conditions upon stevedores is not unlawful, he found, provided the charges and conditions are fair, reasonable and related to facilities and services provided stevedores for their benefit. As support for this position, the Administrative Law Judge noted that several competitive grain elevators now assess similar charges and conditions, and there is no evidence of record that Baton Rouge has lost any vessels to the public grain elevators at New Orleans, although that elevator does not impose like charges and conditions.

The Administrative Law Judge discussed particular "benefits" to stevedores including a shipping gallery and grain dock. The shipping gallery is a "highly refined" mechanical conveyor system for delivering grain from the elevator to the vessel, without which it would take "scores of longshoremen moving grain in bags" to convey equal amounts of grain. The grain dock, a platform at the river end of the gallery, houses the machinery and the spouts which bring the grain into a position where it can be dumped into the vessel. Additionally, water, toilets, telephones, utilities and dock clean-up and liaison service are also benefits to the stevedores for which it is contended they should pay. Additionally, the Linnekin study allocates land rental charges to the stevedores.

The Administrative Law Judge then discussed each facility and service and arrived at the following conclusions:

1. *The shipping gallery.* According to the rule enunciated in *Greater Baton Rouge Port Commission* v. *United States, supra,* note 3, the function and responsibility of the stevedore does not attach until the grain is discharged from the loading spout over the hold of the vessel. The loading spout can be equated with "ships tackle" or "point of rest" wherein general cargo is considered delivered to the ship. The speed of transit of the gallery is an advantage to the elevator, not the stevedore. The Linnekin study allocated costs initially at the rate of 75 percent of the gallery rental to the stevedore, 25 percent to the cargo; then 50–50. The constructed charges under this theory appear duplicative of the charges to the holders of warehouse receipts, and accordingly the Administrative Law Judge found that the cost of the shipping gallery is not shown to be a proper and reasonable charge against the stevedores.

2. *Grain dock-wharf.* Linnekin states the wharf benefits stevedores because it allows ingress and egress to and from the vessel. However,

the Administrative Law Judge found that the vessel is the primary beneficiary of the wharf. However, the cost had been allocated 100 percent against the stevedores. The wharf included the entire barge unloading facility, pile clusters, the dust collection system, a multi-platform structure, upper and lower catwalks and the spouts. The Administrative Law Judge found that the barge unloading facility is used strictly for Cargill's benefit, the pile clusters are used exclusively by the vessels, and the dust collection system is used to avoid grain dust explosions.

3. *Water, toilets, telephones and utilities.* These items total $933.00 per year and include certain unsubstantiated charges. Basically, the stevedores are being charged for a Cargill-supplied sound powered telephone, fixtures, fuses, bulbs and labor and Cargill-furnished electricity for lighting the wharf. Under Cargill's tariff, the vessel is required to furnish adequate lighting for night reception of cargo.

4. *Dock clean-up and liaison service.* These items were allocated at four man-hours per day and costs thereof. The Administrative Law Judge found that the dock is cleaned only sporadically and "liaison fees" of $25,000 a year are unsubstantiated.

5. *Overhead expenses.* These were allocated at 2.3 percent to the stevedores. Such expenses included Cargill's overall terminal elevator administrative expenses (of which 16.88 percent was allocated to Baton Rouge), Minneapolis branch office administrative expenses, management fees, and New York office expenses.

The Administrative Law Judge summarized his findings as follows:

On the basis of the record the costs allocated to stevedores as the basis for the charges and conditions imposed by Cargill have not been shown to be reasonably related to use or benefit to stevedores from services and facilities provided by Cargill. The principal facilities upon which the charges and conditions are sought to be justified by Cargill are the shipping gallery and the wharf. Neither facility is maintained and operated principally for the benefit of stevedores. The contention that the "benefit" to the stevedore from the shipping gallery and the grain dock is the transportation of the grain one thousand feet from the elevator to the vessel is not valid. The stevedoring function and, hence this "benefit" to stevedores, does not begin, for all practical purposes, until the grain is delivered at the end of the spout. The fact that the mechanism of the shipping gallery permits more rapid delivery of the grain at the end of the spout benefits the cargo and, perhaps, the vessel. It does not appreciably benefit the stevedore. His function is to properly load the vessel with grain "delivered" by the terminal at the end of the spout over the hold. Cargill's function is to make grain available for loading the vessel by delivering it at that point. Without

the shipping gallery in its entirety, Cargill could not deliver the grain from elevator to spout end. Also, the charge to stevedores for the shipping gallery duplicates the charge on holders of warehouse receipts for the same facility. No cost allocable to the shipping gallery may properly be charged to the stevedore.

Since the Port Commission, under the terms of the lease, charges vessels for the use of the wharf through dockage fees, no part of the cost of the wharf may properly be charged to stevedores. It does not appear that either the clean-up charge or the liaison charge is justified on the basis of this record. Nor is the allocation of overhead justified on the basis of the record.

The Administrative Law Judge thereafter discussed the four regulations Cargill has imposed upon the stevedores, to wit: (1) requiring execution of an agreement that the stevedores will exercise "utmost care" in conducting their operations, coupled with a contractual indemnity agreement; (2) insurance coverage in specified amounts written with companies acceptable to Cargill's reasonable satisfaction; (3) $100.00 per hour liquidated damages for delays caused by stevedores; and (4) deposits totaling $3500.00 to secure payment of the charges. The Administrative Law Judge found the standard of "utmost care" unreasonable and the indemnity agreements unfair as against public policy. He found the insurance requirement susceptible to abuse in that Cargill must be "reasonably" satisfied as to which company writes the policy. The $100.00 per hour liquidated damage provision is a one-sided arrangement. The Administrative Law Judge felt that BARMA was entitled to a reciprocal clause. Lastly, he found the deposit of $1500.00 to secure payment of the access and dock cleaning charge to be unreasonable and unsupported by facts; however, the $2000.00 deposit to secure payment of liquidated damages was found to be reasonable, if Cargill posted a similar deposit for delays it caused.

One argument raised by Hearing Counsel in its Answer and rebutted by Cargill in its Reply was that Cargill's failure to file the subject charges and regulations in its terminal tariff is violative of section 17 of the Act. The Administrative Law Judge did not address himself to this issue in the initial decision, but we will consider it in our final determinations.

IV. *EXCEPTIONS*

Exceptions and replies were filed by all parties in the proceeding.

BARMA excepts to the initial decision on the single ground that it is in error as a matter of law, in that it fails to hold that the compulsory imposition of the charges against stevedores by Cargill in its dual role

as a terminal operator and stevedore is unlawful *per se,* is unduly anticompetitive and discriminatory, constitutes an unreasonable preference or privilege in violation of 16 First of the Act, and is an unjust and unreasonable practice in violation of section 17 of the Act.

Complainant urges that because of the status of the Cargill/Rogers arrangement, it competes with BARMA and is thus levying charges against competitors, an illegal, anticompetitive practice. BARMA calls the Cargill/Rogers relationship a "sham", urging that all that transpires is that when Rogers pays the charges, money merely passes from one pocket to the other. Complainant compares this case to the Commission's decision in *California Stevedore & Ballast Co., et al.* v. *Stockton Elevators, Inc.,*[7] (hereinafter *Stockton*) and argues that *Stockton* demonstrates precisely why Cargill's scheme is unlawful: i.e., where a terminal operator seeks to compete as a stevedore, either directly or through a stevedore subsidiary, affiliate or subcontractor, any compulsory charge imposed by it against competing stevedores will be unlawful *per se.*

BARMA urges that the substantial competitive and economic advantage obtained by the Cargill/Rogers arrangement constitutes actual damage to BARMA, and because Cargill is capable of absorbing the cost, the practice will eventually put BARMA out of business.

Cargill, in its exceptions, supports the Administrative Law Judge's decision insofar as it finds that the charges and conditions imposed by Cargill have not harmed BARMA, are neither preferential nor discriminatory, and do not violate section 16 of the Act. Cargill takes issue with that portion of the initial decision which concludes that the charges and conditions constitute an unfiled modification of a section 15 agreement and that they are unjust and unreasonable practices in violation of section 17 of the Act. Cargill argues that the Administrative Law Judge erred in concluding that this case is an extension of its previous litigation, and contends that the two cases are not related at all.

Cargill essentially reargues its position that it acted unilaterally, and hence the charges it has established were not instituted pursuant to an agreement between Cargill and the Port. Respondent then cites several Commission cases wherein it was held that we have no jurisdiction under section 15 over unilateral action.[8] Cargill urges that it has not modified the initial lease agreement, and that a fair reading of the lease indicates that the Port meant to transfer plenary power to Car-

[7] 8 F.M.C. 97 (1964).

[8] See, *Agreement No. T-2423 Between the Port of Seattle, Washington & Pacific Molasses Co.,* FMC Docket No. 70-35, 12 S.R.R. 221, 222 (1971); *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134, 140 (1966).

gill to deal with stevedores or any other third party at the elevator.

Cargill maintains that lease disputes should be settled by the parties and that the Commission should not act as an umpire of section 15 agreements. As further support for its arguments, Cargill cites *Boston Shipping Assn.* v. *Port of Boston Marine Terminal Ass'n.*,[9] where the Commission held certain joint activities, to wit: a change in allocation of a charge by parties to an approved section 15 agreement, did not constitute a new agreement or modification of the existing agreement. Cargill maintains that the present case, except for the joint activity, is identical, merely involving the shift of a charge from one party to another.

Cargill further argues that the Linnekin studies establish that benefits do accrue to the stevedores, contrary to the Administrative Law Judge's findings that the costs are not reasonably shown to be related to use or benefit to stevedores. Cargill calls this decision erroneous, stating that it demonstrates a complete lack of understanding of the Freas Formula and its use. Cargill urges that the Commission decision in *Rates and Practices of the Pacific Northwest Tidewater Elevators Ass'n.*,[10] in which the Commission at page 390 of that decision adopted the standard suggested by Mr. Linnekin that the Freas Formula (that the loading operation begins somewhere along the shipping gallery) should be controlling, and that the Administrative Law Judge rejects this holding without explanation.[11] Cargill urges reversal of this portion of the initial decision.

Cargill cites several "glaring errors" in the initial decision and discusses them as follows:

1. The Administrative Law Judge dismissed the "substantial testimony" that the stevedores benefit from the high output and rapid speed of the elevator.

2. The cost allocated to the stevedores "appears to be duplicative of the charges to holders of warehouse receipts"; Cargill does not find this on the record.

3. A cost item of $933 per annum for water, toilets, telephones and utilities was not susceptible to verification from underlying data. Cargill states its witness Pederson was available for cross-examination.

4. There are no figures to substantiate the sum of $25,000 for liaison

[9]10 F.M.C. 409 (1967).

[10]11 F.M.C. 369 (1968).

[11]Cargill surmises the reason for the Administrative Law Judge's rejection of the "controlling rule" is that the presiding Judge apparently thought that *Pacific Northwest Elevators, supra,* note 10, was inconsistent with the earlier court decision in *Greater Baton Rouge Port Commission, supra,* note 3. The two decisions are in no way inconsistent, says Cargill; *Greater Baton Rouge Port Commission* simply found that the Federal Maritime Board had jurisdiction over marine terminal elevators. In the *Pacific Northwest Elevators* case, seven years later, the FMC exercised this jurisdiction and set principles for cost allocation at the marine terminal elevators. In the instant case the presiding Judge was bound by the *Pacific Northwest Elevators* cost allocation principles.

services. Cargill states that, while it furnished no figures, it did give testimony of its liaison functions and employed full time help in this capacity.

5. Lastly, Cargill says the initial decision rejects any allocation for cost for overhead to stevedores, despite testimony of two expert accountants.

In summation, Cargill requests reversal of the initial decision and dismissal of the proceeding.

Hearing Counsel fully subscribe to the Administrative Law Judge's ultimate conclusions, except to strike and correct certain statements of fact,[12] listing them as follows:

1) Correct certain quoted language from the lease to conform to the specific language of Articles 7, 10 and 17 of the lease.

2) Modify the quoted conditions imposed by Cargill as set forth earlier in this report to read as follows: [13]

> The stevedore will use utmost care in his operations, . . . and will provide evidence of liability insurance coverage with limits as follows:
> Workmen's Compensation—as required by statute:
> Employers' liability including coverage under Federal Longshoremen's and Harbor Workers Compensation Act—$100,000;
> Comprehensive general liability including automobile:
> (i) bodily injury—$200,000 each person;
> (ii) $500,000 each accident;
> (iii) property damage—$500,000 each accident.

V. *REPLIES TO EXCEPTIONS*

BARMA replied to Cargill's exceptions urging that Cargill has a monopoly in the elevator pursuant to the section 15 agreement and that any actions taken under the agreement are subject to the agreement. BARMA then rebuts Cargill's reference to the "unchallenged" rule of *Boston Shipping, supra,* note 9, urging that the Commission is well aware that the Court of Appeals for the First Circuit reversed the Commission decision,[14] and that the controlling theory in this matter

[12] Such facts have been corrected herein, as necessary.

[13] The original language in the initial decision did not specifically state the limits and categories of insurance to be provided.

[14] See *Port of Boston Marine Terminal Ass'n. v. Boston Shipping Assn.*, 420 F.2d 419 (1st Cir.1970). BARMA urges, *inter alia*, that this case stands for the fact that modifications of section 15 agreement as well as the original agreement need Commission approval, quoting as follows:

> . . . Section 15 requires that "modifications", as well as the original agreement, receive the prior approval of the Commission. In Boston Shipping the Commission, without any discussion of the broad language of the act held that where, under the already approved agreement, there was power to fix charges, a change in incidence, as to who was obligated to pay, was not a modification requiring Section 15 filing and approval. In the light of the strictures expressed in VW, supra, n. 1, *this holding seems unsupportable. While, with some consistency, it represented the Commission's past reading of the statute, the Court in VW pointed to the "expansive language" of Section 15 and specifically rejected the binding effect of the Commission's administrative construction.* 390 U.S. 261, 272–73. (BARMA's emphasis).

is represented by *Volkswagenwerk* v. *F.M.C.*[15] BARMA urges again that Cargill's charges and conditions are not justified, and provide no benefit to the stevedore, and that, contrary to Cargill's contention, the decision in ***Rates and Practices of Pacific Northwest Tidewater Elevators Ass'n., supra,*** note 10, is erroneous and not controlling.

Cargill replied to the exceptions of BARMA and Hearing Counsel, urging that contrary to the position of BARMA, a terminal operator affiliated with a stevedore operating at that terminal may impose uniform charges against all stevedores operating at the terminal. To support this premise Cargill again cites the *Stockton Elevator* case,[16] urging that no evil results from its relationship with Rogers, as Rogers is also assessed the charges and such charges are reflected in Rogers' tariff. Cargill then refutes BARMA's claims of antitrust monopoly, and urges that BARMA's claims of economic injury are speculative and should be dismissed, as found by the Administrative Law Judge.

Lastly, Cargill urges that BARMA's attack upon the Linnekin study is improper and in error. Cargill agrees with Hearing Counsel's factual exceptions, but disagrees with Hearing Counsel's statement that the errors of the Administrative Law Judge do "not vitiate the ultimate conclusions reached by the Presiding Officer." Concluding its reply, Cargill urges rejection of BARMA's exceptions.

Hearing Counsel replied to Cargill's and BARMA's exceptions and attempted to clarify the record.

Hearing Counsel first address themselves to complainant's exceptions wherein BARMA urged that the Administrative Law Judge failed to find that where a terminal operator seeks to compete as a stevedore either by itself or through a subsidiary, any charges it assesses against competing stevedores would be unlawful *per se.* Hearing Counsel state that the Administrative Law Judge addressed himself to that point and properly decided that charges of this type need not be prohibited solely because one party against whom such charges are assessed is a wholly-owned subsidiary of the operator of the elevator.

Hearing Counsel then reviews complainant's argument concerning the *Stockton* case, wherein BARMA urges the Commission to impose a rule to prohibit any terminal operator with a stevedore subsidiary from assessing any compulsory charge, for any reason. Hearing Counsel say *Stockton* does not support such a conclusion.[17] In *Stockton,* it

[15]390 U.S. 261, 19 L.Ed.2d 1090, 88 S. Ct. 929 (1968).

[16]See also, *Pittston Stevedoring Corp.* v. *New Haven Terminal, Inc.* 13 F.M.C. 33 (1969).

[17]Stockton was an elevator operator which employed Jones as its stevedoring subcontractor. It imposed a 15 cent noncompulsory equipment rental charge on all stevedores operating at its elevator *except* Jones. Stockton would bill the vessel on the basis of a flat charge which included all service rendered, the 15 cent charge, and its profit. In at least one instance, the 15 cent charge was not included in Stockton's bill to the vessel. In holding the charge violative of section 17, the Commission said:

We agree with respondent that the employment of one stevedoring subcontractor in preference to another or even

was the ambiguous tariff, not the terminal operator/stevedore combination, that was the unreasonable practice.

BARMA, say Hearing Counsel, has been attempting to show an antitrust monopoly on Cargill's part. However, say Hearing Counsel, no facts have been adduced to prove this point.

Hearing Counsel then cite Commission precedent in similar matters as follows:

1. A terminal operator is entitled to a fair return on its investment and may make a fair and nondiscriminatory charge for the use of its facilities, citing *Stockton;*

2. Such a fair and nondiscriminatory charge may be assessed against stevedores, provided such a charge is reasonably related to services rendered by the terminal operator to or for the benefit of the stevedore, *Crown Steel Sales, Inc., et al.* v. *Port of Chicago,* 12 F.M.C. 353, 373 (1967); and *Pittston Stevedoring Corporation* v. *New Haven Terminal, Inc., supra,* note 5; and,

3. No discrimination results where charges are uniformly applied, *Boston Shipping Association* v. *Port of Boston Marine Terminal, supra* note 9; and *Terminal Charges at Norfolk,* 1 U.S.S.B.B. 357, 358 (1935).

Hearing Counsel submit that the Administrative Law Judge properly examined the evidence and applied the foregoing standard.

Turning its attention to Cargill's exceptions, Hearing Counsel state that respondent, in citing several cases,[18] misses the point of the decision in these cases, which, contrary to Cargill's interpretation, were decided on the single issue that no agreement was presented since one of the parties in each proceeding had withdrawn.

Hearing Counsel then argue that the Administrative Law Judge correctly determined that the charges and conditions constituted a modification of the section 15 agreement, which modification had not been filed with the Commission for approval.

Hearing Counsel take issue with Cargill's statement that it has plenary power to deal with stevedores and others. Stevedores, say Hearing Counsel, are hired by the vessel and subject to the master of the vessel. Further, the Port has promulgated rules for stevedores, and it

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to the exclusion of another does not necessarily constitute an unreasonable regulation or practice under section 17 . . . [citation omitted]. But that is not the question here. The issue here does not concern who is to be respondent's subcontractor, rather it is the difference in treatment accorded by respondent to Jones, and to itself as a stevedore, on the one hand, as compared with the treatment of complainants on the other. This difference in treatment results from the imposition of the rental charge upon complainants, but not upon Jones. Moreover, it is not imposed *by* respondent acting as owner and operator of the terminal *upon* respondent acting in the capacity of a stevedore, in the same manner as it is imposed upon complainants. (Emphasis added.)

[18] *Agreement No. T-2423 Between the Port of Seattle, Washington and Pacific Molasses Co., supra* note 8; *Inter-American Freight Conference—Cargo Pooling Agreements,* 14 F.M.C. 58 (1970); and *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement, supra* note 8.

is therefore illogical to assume that the Port was transferring "plenary" powers to Cargill to deal with stevedores.

Hearing Counsel then argue that in spite of Cargill's urgings, the Administrative Law Judge distinguished the cases in relying upon the proper cases [19] rather than *Pacific Northwest, supra,* note 10, and properly rejected portions of Mr. Linnekin's testimony. Hearing Counsel find Mr. Linnekin's total testimony in the proceeding to be worthless.

Lastly, Hearing Counsel specifically refute Cargill's five specific errors as being without merit. Hearing Counsel, in summation, find the exceptions of both complainant and respondent erroneous, and urge their dismissal.

VI. *ISSUES*

The basic issues to be resolved by the Commission are as follows:

Section 15

Do the charges assessed and conditions imposed by Cargill on the stevedores as a prerequisite to loading vessels at Port Allen as set forth in Cargill's letters of February 10 and December 17, 1971, constitute a modification of the approved lease agreement between the Port and Cargill?

Section 16

1. Have Cargill's actions resulted in actual damage to BARMA?
2. Does the relationship between Cargill/Rogers *ipso facto* render the charges and conditions imposed on all stevedores equally unlawful as unduly anticompetitive and discriminatory?
3. Has unreasonable preference or privilege as contemplated by section 16 First of the Act been established from the charges and conditions imposed on all stevedores, including Cargill's subsidiary, Rogers, although substantial competitive advantage exists in the Cargill/Rogers relationship?

Section 17

1. Are the following charges and conditions reasonably related to economic or commercial benefits to stevedores from the use of the facilities and services provided by Cargill:

(a) Eight cents per ton of grain handled for services and facilities provided by Cargill;

[19] *Agreement Nos. 8225 and 8225–1, supra,* note 1; *Greater Baton Rouge Port Commission v. U.S., supra* note 3.

(b) $100.00 per hour liquidated damages for failure to provide sufficient crews of stevedores so that the elevator may operate at capacity;

(c) that stevedore will use "utmost care" in his operations;

(d) that stevedore will provide evidence of adequate insurance liability by companies acceptable to Cargill; and

(e) that deposits totaling $3,500.00 will be posted by the stevedore to secure payment of access, dock cleaning fees and liquidated damages for delays?

2. Should Cargill be ordered to cease and desist from those actions cited under the aforementioned issue found not to be reasonably related to economic or commercial benefits to stevedores?

3. Does the failure to file with the Commission notice of new charges and conditions imposed upon stevedores in Cargill's tariff result in an unjust and unreasonable practice in violation of section 17 of the Act?

VII. *CONCLUSIONS*

Section 15

It is our opinion that the Administrative Law Judge erred in finding that the charges and conditions imposed by Cargill's letters of February 10 and December 17, 1971, constituted a modification of the Commission-approved lease agreement between Cargill and the Port. Nowhere in the lease is there any restriction on lessee's granted authority to establish and maintain rates for the handling and storage of grain, saving only (a) lessee could not access dockage charges, that being reserved to the lessor, and (b) the rates for storage and handling grain must be competitive and comparable with rates at New Orleans and other competitive Gulf ports (Art. 10 of lease—Agreement FMC 8225).[20] In all other respects, relative to rates, rules, and regulations, Cargill was as free of restrictions as it would have been had it owned the facilities.

The lease did not require identical rates. The lease required only "competitive" rates, and, according to the record in this case, the fact that grain has moved and is moving in capacity volume via Baton Rouge is persuasive evidence that the rates are competitive. Some or all of the rates could even be higher than rates at New Orleans and other Gulf ports and still be "competitive" if Baton Rouge were a more efficient elevator, for it is the *aggregate* costs to the merchant (inclusive of speed in loading, waiting time, distance from the Gulf, dockage, etc.) which establish whether the rates are competitive.

[20] Article 10 of the lease also provides in part that the rates, rules, and regulations shall be subject "to the approval of public regulatory bodies having jurisdiction thereof."

What was the extent and scope of the approval given to this lease by the Federal Maritime Board in 1959? We take official notice of our own records relating to that approval action.[21] Our examination thereof discloses there are no conditions, restrictions, or qualifications contained in the Board's order approving the lease, and no record indication of Board consideration ever having been given to imposing conditions, restrictions, or qualifications on lessee's plenary power over rates, rules, and regulations. The Federal Maritime Board having approved plenary rate authority, this Commission may not lawfully modify, reduce, or restrict that approval without initiating and following the notice and hearing procedures established by section 15, Shipping Act, 1916, and section 9, Administrative Procedure Act.

The lease authorized lessee to establish *any* competitive rates for storing and handling grain, and that authorization was not restricted only to those rates or charges which may have been in effect when the lease was adopted. This was a long-term lease and the parties used broad, expansive language in the grant of ratemaking authority, for conditions and needs change with passing time. To have attempted to define every conceivable item of use or service for which lessee was free to assess charges or to make rules and regulations in this long-term lease would have been difficult.[22] Instead, the drafters wisely limited themselves to identifying only those things which the lessee was not permitted to do.

Cargill is operating under authority granted to it by and within the limits of the approved lease. The charges assessed by Cargill against stevedores constitute actions taken within the lease authority and do not constitute either a modification of the approved agreement or

[21] *Swift & Company* v. *Federal Maritime Commission*, 306 F.2d 277 at 281 (D.C. Cir. 1962).
"... The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval."
Trans-Pacific Freight Conference of Japan v. *FMC*, 314 F.2d 928 (9th Cir. 1963).

[22] An incomplete list of services, facilities, and uses made available by port elevators as indicated by terminal tariffs on file with this Commission (Koppel Bulk Terminal Tariff No. 1, FMC-T No. 1; North Pacific Grain Growers, Inc., Tariff No. 3) include the following:

Receiving (elevation) from truck, rail cars, barge
Shipping to vessels, rail cars, barges, trucks

Weighing in	Weighing out	Cleaning
Storage	Segregation	Drying
Smutting	Fumigation	Treating for weevil
Blending	Aeration	Cooling
Binning	Turning	Sampling and inspection
Wharfage	Dockage	Line handling charges

Fresh water
Rental of marine leg or sucker
Rental of spreaders and other equipment
Rental to stevedores of storage and office space
Electric power to vessel
Electric power to grain spreaders
Service and facilities charge

independent action by Cargill taken outside its lease authority. Thus, the charges and conditions imposed on the stevedores by the Cargill letters do not require further approval by the Commission under section 15. We, therefore, reverse those findings of the Administrative Law Judge with respect to the section 15 issue.

Section 16

With regard to the issue of actual damages to BARMA as a result of imposition of the new charges and conditions, we concur with the Administrative Law Judge. No evidence of record has been presented to show actual damage to BARMA as a result of the new charges and conditions.

We further concur with the Administrative Law Judge in his finding that the relationship between Cargill and Rogers did not in and of itself render unlawful the imposition of the charges and conditions imposed equally upon all stevedores. The record, while indicating that a situation exists that could give rise to discriminatory practices, does not indicate that any unlawful situation does in fact exist.[23] The Commission has long recognized the legality of terminal operators also conducting stevedoring operations. So long as the Cargill/Rogers relationship remains at arm's length, Rogers pays to Cargill the same eight cents per ton charges as BARMA and other stevedores and no competitive advantage is given Rogers over BARMA and its members, no unreasonable preference or privilege exists that would be violative of section 16 First of the Act.[24]

Reasonableness of Charges and Conditions

The primary issue before the Commission in this proceeding is whether the charges and conditions imposed upon the stevedores by Cargill are just and reasonable within the meaning of the second paragraph of section 17 of the Act, which provides:

> Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivery of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[23]The record establishes that Cargill has billed and collected the charge in question both from BARMA and from Rogers. If, in order for Cargill to realize a fair return from capacity use of the facilities, Cargill requires, say, $100,000 revenue per year from the assessment on stevedores, then it is obvious that Cargill must collect the full charge per ton no matter who does the stevedoring. Thus, this is not a situation where Rogers will receive a competitive advantage for Rogers must pay the charges in order for Cargill to be made whole. The factual situation here is quite unlike that which existed in *California Stevedore & Ballast Co. v. Stockton Elevators, Inc.*, 8 F.M.C. 97 (1964), where the port elevator failed to assess a charge against its "house" stevedore but did assess the charge against all other stevedores.

[24]*Ballmill Lumber* v. *Port of New York Authority*, 11 F.M.C. 494 (1968); 12 F.M.C. 29 (1968); 13 F.M.C. 262 (1970); *Chr. Salvesen & Co., Ltd.* v. *West Mich. Dock & Market Corp.*, 12 F.M.C. 135, 141 (1968).

Respondents, in the operation of their grain terminal elevators, are "other persons" within the meaning of section 17 and as that term is defined in section 1 of the Act.[25]

Furthermore, the term "practice" as used in section 17 of the Act is associated with rates and charges.[26] We will thus discuss each charge and condition separately.

1. The service and facilities charge.

As previously discussed, this charge is to be assessed at eight cents per ton of grain handled for services and facilities provided by Cargill. Respondent contends that this charge is based upon the benefits derived by stevedores for use of its facilities, for which it contends it should be reimbursed. We accept this basic contention. The question then is whether the practices of respondent in its determination and allocation of costs are reasonable. We will examine only the factors which were used to determine the charge as to the reasonableness of each such factor. It therefore follows that if any one or all such underlying factors are found to be unreasonably related to the benefits derived therefrom by stevedores, then the practice of assessing charges based upon those factors is itself unreasonable.[27] This finding would not therefore preclude respondent from assessing a charge against stevedores based upon those supplied services and facilities that were found to be of actual benefit to stevedores.

The basis upon which Cargill seeks to assess the eight cents per ton charge arises under the following services and facilities provided: 1) the shipping gallery; 2) the grain dock-wharf; 3) water, toilets, telephones and utilities; 4) dock clean-up and liaison service; 5) overhead expenses; and 6) trimming machines.[28]

The specific description of each of the above services and facilities has heretofore been discussed under our review of the Administrative Law Judge's initial decision. We will thus only consider the underlying costs to Cargill of each item, the allocation of any or all of that cost to stevedores, and the reasonableness of such an allocation based upon the actual benefits derived by stevedores from the use or availability of that service or facility.

First, we will look at the shipping gallery. Respondent contends that one-half of the benefits derived by use of the shipping gallery flow to

[25] *California* v. *U.S.*, 320 U.S. 577 (1944).

[26] *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 432 (1935).

[27] *Transamerican Trailer Transport Inc., et al.* v. *Federal Maritime Commission*, No. 24,019, 492 F.2nd 617, 624 (D.C. Cir., Jan. 28, 1974).

[28] By its letter of December 17, 1971, respondent advised the stevedores of its intention to raise the initial five cents charge (now in effect) to eight cents thirty days after the effective date of a decision by the Commission in favor of Cargill. This charge would absorb the earlier sought $50 per vessel dock clean-up charge, as well as one cent per ton charge for the use of trimming machines which was not contested.

the stevedores, the other half flowing to the cargo. Past applications of the Freas Formula to grain elevator operations have normally assessed one-half of the costs of the shipping gallery to the cargo and one-half to the *vessel.* The Commission has previously approved this allocation. *Rates of Pacific Northwest Tidewater Elevators Association, supra,* note 10. There, as here, Linnekin contended that the cargo benefits equally from the faster loading and greater efficiency made possible by the gallery by lowering the loading expenses. We concur with this contention. The controversy arises, however, over the allocation of the remaining full fifty percent to the stevedores.

The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel. Stevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel under past applications of the Freas Formula. As stated above, the cargo benefits by incurring lower loading expenses. The vessel benefits by having to spend fewer days in port for loading operations, thus allowing it to transport more shiploads over a shorter period of time. But no such benefit can be equated to stevedores. In fact, it can be argued that the speed and efficiency of the shipping gallery works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores. We recognize that the costs associated with the use of the shipping gallery are allocable to those who derive an economic and commercial benefit from the use thereof. We do not, however, recognize that the stevedores fall into this recipient category, at least not to the degree as that of the cargo or the vessel.

As Linnekin has stated and past Commission decisions have approved, the cargo benefits to the extent of fifty percent of the allocable expenses associated with the shipping gallery. The remaining fifty percent of allocable expense is thus attributable to the other two beneficiaries, namely the vessel and the stevedore. But not all of this remaining fifty percent can be attributable to the stevedore or the vessel individually. A portion of this remining fifty percent is allocable to each, and any charge sought to be imposed upon either must be based entirely thereon. Therefore, the allocation of a full fifty percent of the costs of the shipping gallery to the stevedores is an unreasonable practice within the meaning of section 17 of the Act.[29]

A similar conclusion is reached with regard to the allocation of the

[29]The charges associated with the shipping gallery are "wharfage" within the definition of that term under Commission rules (46 CFR 533.6(d)(2)). Inasmuch as the lease only precludes Cargill from assessing "dockage" against the vessel (46 CFR 533.6(d)(1)), this charge would be assessable against the vessel to the extent sought to be imposed on the stevedores.

total costs of the grain dock and wharf to the stevedores. The Commission in the *Pacific Northwest Elevators* case approved allocation of the total costs of the grain dock to the *vessel*. However, in this proceeding the terms of the lease between Cargill and the Port preclude Cargill from charging dockage to vessels calling at its facilities. Charges associated with use of the grain dock-wharf analogous to normal dockage charges against vessels are not chargeable to the stevedores. There is, however, no prohibition against charging wharfage to the vessel.

Stevedores benefit from the privilege of ingress and egress from the vessel and to some degree from the use of the spouts, but in no way can the total cost for the use of the dock be attributed to stevedores. The cargo benefits from the use of the spouts, as does the vessel for the same reasons they benefit from use of the shipping gallery. We, therefore, concur with that finding of the Administrative Law Judge that the charge, inasmuch as it relates to use of the barge unloading facility, the pile clusters, the dust collection system, and the spouts to the extent assessable against cargo or vessel, is an unreasonable practice under section 17.

The record provides scant evidence regarding the assessments of charges for the various utilities and overhead expenses associated with Cargill's operation. However, the allocation to stevedores of $933.00 per year for water, toilets, telephones and utilities does not appear to be so unreasonable as to justify disapproval. Nor does the amount of overhead expenses allocated to the stevedores appear to be unreasonable. The costs associated with the use of the trimming machines were not contested.

Those costs, however, which are associated with dock clean-up and liaison service have not been justified on the record. The evidence presented shows that the docks are cleaned only sporadically and that the $25,000 per year for liaison services was unsubstantiated. Those portions of the overall costs which are based upon these factors have therefore not been shown to be reasonably related to the benefits derived therefrom by the stevedores. As such, we find the assessment of any charges based upon these services and facilities to be unreasonable practices within the meaning of section 17 of the Act.

In weighing the overall effect of the various factors used to derive the eight cents per ton charge, we find sufficient unwarranted allocations of costs to stevedores to sustain a finding that the imposition of any charge which was compiled by use of any of the aforementioned unwarranted cost factors to be an unreasonable practice under section 17. Respondent should thus cease and resist from assessing such charges where based upon costs of services and facilities found herein to be unassessable against stevedores.

2. The conditions sought to be imposed.

We find that the imposition of an indemnity requirement of $100 per hour for delays caused by failure to provide sufficient numbers of longshoremen to be an unreasonable practice within the meaning of section 17. This is a one-sided requirement with no compensation awarded to stevedores for delays caused by Cargill. Likewise, the requirements for use of "utmost care" in its operations, for evidence of adequate liability insurance coverage insofar as the insurance companies must be acceptable to Cargill, and for posting deposits to secure payment of the service and facilities charge and the delay indemnity charges are found to be equally one-sided and thus unreasonable practices within the meaning of section 17. With regard to the insurance requirement, it would appear to be sufficient to accept insurance coverage from any company licensed to do business in Louisiana.

Failure to File Schedule of Charges.

The Commission's General Order 15 (46 CFR 533) provides in section 533.3 that all terminal operators (with certain exceptions not applicable here) file ". . . a schedule or tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities." As noted earlier, the Administrative Law Judge did not address this issue in his Initial Decision. We, however, consider that respondent's failure to comply with the aforementioned provision to be an unreasonable practice in violation of section 17 of the Act, and as such do hereby order that respondent file forthwith any and all charges and conditions within the limits authorized by this decision which Cargill intends to impose. We further direct Cargill to cease and desist from all practices found unreasonable herein.

REMAND TO ADMINISTRATIVE LAW JUDGE

We adopt the recommendation of Commissioners Barrett and Morse in their concurring and dissenting opinion that the case be remanded to the Administrative Law Judge for a resolution of the sole issue of the proper allocation of services and facilities benefits to stevedores based upon actual use as outlined in this report, in order to arrive at a charge that can be properly assessed against the stevedores.

Commissioners Ashton C. Barrett and Clarence Morse, concurring and dissenting:

We are not appointed to simply call "balls and strikes". Rather, we are appointed to develop a full record in all cases and to decide mat-

ters on their true merits and in the overall public interest and not on mere procedural shortcomings or on incomplete or inadequate record.[30] If there is any question still remaining in the minds of the majority that there exists a reasonable relationship between costs/benefits and the assessment charge in this proceeding, we recommend the matter be remanded for a resolution of this issue, including additional evidence, if necessary.

We are in agreement with Chairman Bentley and Commissioner Day that the charges assessed and the conditions imposed by respondent upon all stevedores operating at the leased terminal facility constitute activities and charges falling within the scope of Agreement No. 8225 and do not constitute a modification to an approved section 15 agreement for which further Commission approval is required.[31]

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that no unreasonable preference or privilege as contemplated by section 16 First of the Act resulted from the imposition by respondent of charges and conditions on all stevedores, including respondent's subsidiary.

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that the relationship between a terminal operator and a wholly-owned stevedore does not *ipso facto* render charges assessed and conditions imposed equally on all stevedores unduly anticompeti-

[30] *Isbrandtsen Co., Inc.* v. *United States*, 96 F.Supp. 883 at 892 (1951), aff'd. per curiam 342 U.S. 950, quoting with approval: "... the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: 'They are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in ... The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible ...'"

[31] It has been contended that these actions by Cargill constitute an unapproved "unilateral modification" of the approved lease. Absent implied, tacit, or actual consent by Port to the "unilateral modification", we are unable to find an "agreement" between two or more persons approvable under section 15. *American Mail Line Ltd.* v. *Federal Maritime Commission*, ___ F.2d ___ (CA-DC, June 28, 1974), Slip Opinion page 19: "A unilateral undertaking by a single party does not constitute a section 15 agreement." There may be unilateral action taken by one person beyond the scope of the approved section 15 agreement, but that purely unilateral action is not, itself, a section 15 "agreement". As said in *Transshipment Agreement*, 10 F.M.C. 199, 215 (1966): "It Takes Two to Tango". One who acts unilaterally beyond and outside the scope of an approved agreement subjects himself to the penalties of the Shipping Act, 1916, as well as to antitrust. *Carnation*, 383 U.S. 213.

Commissioner Hearn interprets the approval of Agreement No. 8225 as not authorizing Cargill to make the 5_{ϕ} charge against stevedores. Although in this respect the majority is opposed to Commissioner Hearn's views, additional comment is appropriate. *Swift & Company* v. *F.M.C.*, 306 F.2d 277, 281 (1962) holds:

"The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval."

In our opinion, a "delineation" may only be made with the greatest of caution and only after a thorough review of the record and with all appropriate due process safeguards, for, unlike a "modification" under section 15 which has only prospective application and is made only by order, after notice and hearing, a "delineation" has both prospective application and retroactive application, with possible serious economic, Shipping Act, 1916, and antitrust implications, particularly in respect to activities taken prior to the "delineation". Such a review has not been made by the Commission in this case.

tive or discriminatory. On this record there was no proof of undue competition or discrimination.

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that respondent's failure to publish and file the charges and conditions in its terminal tariff is an unjust and unreasonable practice within the meaning of section 17 of the Act.

We agree with Chairman Bentley and Commissioners Day and Hearn that the $100 per hour liquidated damages for delay provision is an unreasonable practice under section 17 of the Act.

We differ with Chairman Bentley and Commissioners Day and Hearn in their conclusions that the 5¢ service and facilities charge [32] is an unreasonable practice under section 17 of the Act.[33] We find and conclude that said charge is lawful, is adequately justified on this record, and its determination, assessment, and collection is not an unreasonable practice under section 17 of the Act.

We adopt the findings of fact set forth in Part II of the above report of Chairman Bentley and Commissioner Day which are not in conflict with the following supplemental findings:

BARMA has been operating continuously as a stevedoring contractor [34] at the Cargill elevator since the inception of the latter's operations in 1955. In 1956, Rogers, Cargill's wholly-owned subsidiary, began operating in competition with BARMA.

Under the lease, dockage is the only fee the Port may charge vessels calling at the grain elevator. The Port's tariff states that all other fees, rules, and regulations pertaining to the grain elevator are to be found in Cargill's tariff.

The charges and regulations complained of herein are similar to those presently in force at a number of grain elevators in the Gulf area, including Cargill's elevator at Houston, and have been assessed by Cargill to all stevedores operating at Port Allen, including its wholly-owned subsidiary Rogers.

Cargill retained Mr. Phillip E. Linnekin, a partner in the interna-

[32] The majority's consideration of the projected 8¢ charge rather than the 5¢ charge now assessed by Cargill is a source of confusion. The charge in effect at the time of hearing and at the present time is 5¢. The 5¢ charge may be raised in the future to 8¢. At the 5¢ rate, Cargill also assesses an additional $50 per vessel to cover dock cleaning. This $50 charge will be eliminated when the 8¢ charge goes into effect. As a result, discussion of the $50 dock cleaning charge with respect to the 8¢ rate is irrelevant and results in a finding of unreasonableness with respect to a nonexisting charge.

[33] The majority states that "Charges associated with use of the grain dock-wharf analogous to normal dockage charges against vessels are not chargeable to the stevedores." The 5¢ charge, however, is neither "analogous to a normal dockage charge" nor is it associated with docking. Dockage is strictly limited to the vessel's *privilege of berthing*—a "parking fee" for vessels. Cargill's 5¢ charge, on the other hand, is a charge for the *use* of the terminal facilities and equipment furnished by Cargill and used by the stevedores in the *handling of cargo*. 46 CFR 533.6(d)(1); *Pacific Northwest Elevators Ass'n, supra*, at 403.

[34] Sometimes referred to as "the stevedore". The term "stevedore" as used herein may mean either the stevedoring company (for example, BARMA), or the employee of the stevedoring company. The employee of the stevedoring company is more accurately called a longshoreman, but is not infrequently called a stevedore. Hence, when the term "stevedore" is used it may mean, depending upon the context, either the stevedoring company or the longshoreman. As used herein, the term "stevedore" usually refers to the stevedoring company.

tional certified public accounting firm of Main Lefrentz & Co., to study the propriety and reasonableness of these charges. Mr. Linnekin, an expert in this field, has appeared before the Commission in numerous proceedings and assisted in the development of the so-called Freas Formula which forms the basis for his allocations and methodology in this proceeding. Previous studies in other proceedings were initiated for the purpose of allocating terminal costs between vessel and cargo only. Mr. Linnekin's study in this proceeding considers and justifies the imposition of charges against stevedores on the ground that the stevedores use the terminal facilities and receive benefit from the use thereof.

Mr. Linnekin classified the leased property into the categories of "land" and "improvements". He valued the land on the basis of its original cost, and the improvements on the basis of the original undepreciated construction cost.[35] He determined that the percentages these two categories bear to the total combined value of the land and improvements amounted to 5.4% and 94.6% respectively. Applying these percentages to Cargill's annual rental payments of $673,600, he determined the amount of said payments applicable to each category as $36,374 to land and $637,226 to improvements. Of the land rental, he allocated 7% to the stevedore for the grain dockwharf, and 93% to cargo.

The largest item allocated to the stevedore is rental allocable to the shipping gallery and to the grain dock-wharf.

The shipping gallery is a conveyor system for the delivery of grain, approximately 1,000 feet long, running from the elevator headhouse to the loading spouts situated on the wharf. It delivers the grain at a loading speed of 1,000 tons per hour and thus permits a faster loading of the vessel than would be possible at a less efficient and less modern facility or by manual loading and stowing of the vessel.

Improvements made by Cargill to the elevator terminal facilities increased the annual volume of grain available for shipment and hence the loading capacity. The turnover rate is 16.5, i.e., the elevator is emptied and refilled sixteen and one-half times during a one-year period. The loading capacity of the elevator has been increased from the original 20 million bushels a year to 113 million bushels in 1971.

Inasmuch as the flow of grain to the vessel is directed by the stevedore's employee (the longshoreman) in respect to the loading and trim of the vessel, the stevedore's function commences at a point somewhere between the headhouse and the water end of the shipping gallery. It is unnecessary in this proceeding to determine where precisely that "point" lies.[36]

[35] Utilization of fair market value or original cost depreciated or other valuation formula would have had but *de minimis* effect on the end results in this proceeding.

Questions of ultimate responsibility as to the delivery of the grain at the end of spout or elsewhere, or questions when transfer of title to the grain ultimately occurs, or questions whether the shipper, the vessel, or the consignee ultimately pays the stevedore are questions arising under sales contracts and charter parties and have nothing to do with the question whether the stevedore receives a benefit from the use of the shipping gallery and of the wharf for which a charge may be made.

Mr. Linnekin excluded the portion of the shipping gallery which extends over the wharf from his definition of the shipping gallery. He allocated 50% of the balance of the shipping gallery to stevedores and 50% to cargo.

The wharf, referred to herein also as grain dock-wharf, situated at the water end of the shipping gallery, houses the loading spouts through which grain is discharged into the hold of the vessel. The lower part of the wharf is also used by the stevedore for access to the vessel. Mr. Linnekin defined the wharf so as to exclude the barge unloading facility and dust collection system and to include that portion of the shipping gallery which extends over the wharf from the point that the two form a "T". He allocated 100% of the rental allocable to the wharf to the stevedore.

The spillage of grain on the wharf as well as dust generated by loading operations creates a safety hazard which requires cleaning of the grain dock-wharf after vessel loading. Cleaning the grain dock-wharf requires approximately 16 man hours and may be done only when the dock is free of vessels.[37] Cargill's personnel spent an average of four man hours a day on dock cleaning, at a cost to Cargill in 1971 of $6,045. The $50 per vessel charge will be incorporated in the proposed charge of 8¢ per ton loaded.[38]

A full-time employee of Cargill is available 24 hours a day, seven days a week, for liaison service to the stevedore. This includes the relay of messages to and from the stevedore and assisting the stevedore in planning and preparing stowage of the vessel, at a cost to the

[36]The statement in *Greater Baton Rouge Port Commission*, 5 F.M.B. 648 at 651, quoted in the majority report, that the function and responsibility of the stevedore does not attach until the grain is discharged from the loading spout is misleading. It is true that physical contact by the stevedore does not occur prior to that time, but directive control over the movement of the grain from the headhouse at the elevator end of the shipping gallery, through the shipping gallery, and thence to the loading spouts is vested in the stevedore's employee (longshoreman) and is effected by signals from the longshoreman to the elevator employee at the headhouse controls. Furthermore, the longshoreman manually moves the direction of the spouts to assure that the grain flows into the proper hatches and areas within the ship's holds. Thus, it is clear that for the purpose of allocating costs as between elevator, cargo, ship, and stevedore, the "point of rest" is definitely somewhere in the area between the headhouse and the wharf. Linnekin utilized that point of rest for cost and benefit allocation purposes.

[37]143 vessels spent 260 loading days at the terminal in 1971.

[38]The Port Commission tariff also contains a similar charge of $50 per vessel of 3,000 net tons or more, for the cleaning of its general cargo docks.

respondent of $25,000 per annum. In light of the services rendered the stevedore, the liaison charge is fully justified.

The 2.3% of the total elevator overhead allocated to the stevedore is based on the percentage that total projected annual revenue from charges against the stevedore bears to the elevator's constructive gross revenue.

The lease authorizes Cargill to assess a facilities and user's charge against stevedores.

The rates and charges assessed by Cargill for the handling and storage of grain are competitive with rates and charges for similar services at other Gulf ports, including, but not limited to, New Orleans.

There is no duplication between the charge assessed by Cargill against the stevedore and the dockage charge assessed by the Port against the vessel, or Cargill's charge to holders of warehouse receipts.

In determining if the 5¢ charge against stevedores is lawful and justified on this record, we must apply the following basic principles of law applicable to terminals:

1. Our ratemaking jurisdiction over rates of terminals rests solely on the second paragraph of section 17 of the Act.

2. We do not have ratemaking power, comparable to our ratemaking authority over common carriers in our domestic off-shore commerce, to establish the rates to be charged.[39]

3. We have jurisdiction only to halt rates or practices which we find are unreasonable or unjust and have limited power to translate these statutory prohibitions into "dollars and cents" terms by establishing a minimum or maximum rate.[40]

4. It is an unjust and unreasonable practice for a terminal to provide free or charge noncompensatory rates for services or use of facilities for such practice results in imposing a disproportionate share of the

[39]The Commission does not possess the ratemaking authority over terminal operators under section 17 to the extent of that authority which is held over carriers by authority of the Intercoastal Shipping Act of 1933. *California* v. *U.S., supra. City of Los Angeles* v. *F.M.C.*, 385 F.2d 678 (1967). In this area, there need be only a reasonable relationship between the charges assessed and the services or benefits provided. *Volkswagenwerk* v. *F.M.C., supra*, at 282. *Evans Cooperage Co.* v. *Board of Commissioners*, 6 F.M.B. 415, 418 (1961).

[40]*City of Los Angeles* v. *F.M.C., supra*, at 681:

"The tariff filed by a port is significantly different from the tariff filed by a common carrier. With respect to the former, the Commission is only authorized to halt rates or practices which are unreasonable or discriminatory. Subject to its limited power to translate these statutory prohibitions into 'dollars and cents' terms by establishing a maximum or minimum rate, the Commission has no ratemaking power with respect to ports. The situation is much different with respect to common carriers, for Section 18 of the Act, 46 U.S.C. §817, explicitly gives the power to establish the rates to be charged and the carrier is obligated to abide by its effective tariff without exception on pain of criminal fines. We are not prepared to say that the Commission was required to do what Congress has refrained from doing and expand section 18 so as to include ports."

Rates and Practices of the Pacific Northwest Tidewater Elevators Assn., supra—see disclaimer at 371.

This is not intended to suggest that we do not have jurisdiction to correct undue preferences or advantages, etc., under section 16 and other sections of the Act.

cost of the terminal on other users of other terminal services or facilities.[41]

5. In establishing the lawfulness of a charge under section 17, a terminal need establish only that the charge is reasonably related to the service or benefit.[42]

Several things are to be borne in mind. First, the Freas Formula which has been utilized by the Commission is but one formula or means which may be utilized to equitably spread the costs of owning and operating a port terminal amongst the various users of the facility. The Freas Formula does not purport to be the sole formula or necessarily the best formula. It is adequate, well recognized, and widely used on the Pacific Coast. It should not be used to defeat charges which legitimately should be assessed. The "objective" of the Freas Formula "is to determine costs"; hence, "no consideration was given to value of service and other factors which must be considered in determining the level of the rates." Its objective is explained in *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57, 59–61 (1948), where all wharfinger expenditures were apportioned to vessel and cargo *only* because in that proceeding vessel and cargo were the only interests involved. A vessel was held liable to the terminal for all usages and services from, but not including, point of rest on outbound traffic; all other wharfinger costs were assessed against cargo.

Second, because under the original Freas Formula, all wharfinger costs were allocated as between vessel and cargo, it would appear unnecessary to belabor the fact that a charge may nevertheless be

[41] *Practices, Etc., of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, 603 (1941). *Investigation of Wharfage Charges at Pacific Coast Ports*, 8 F.M.C. 653, 657 (1965): The Commission, in Docket 555, ". . . found also that the failure of a port terminal to charge compensatory rates for a particular service casts an unfair burden on users of other service in violation of sections 16 and 17 of the 1916 act."

[42] *Volkswagenwerk Etc.* v. *F.M.C.*, *supra*, at 282: The test is ". . . whether the charge levied is reasonably related to the service rendered."

Evans Cooperage Co. v. *Board of Commissioners*, *supra*, at 418:

"The first, second, fourth, sixth and tenth exceptions in effect say that the charges are unreasonable because no specific service is rendered to the complainant and that the Examiner did not consider the evidence showing this. The Examiner, however, considered evidence that wharf tollage does not necessarily cover expenses and services directly rendered to the cargo and also gave weight to the opinions of complainant's witness on this point. The Examiner found that complainant's barge and the cargo involved enjoyed substantial benefits from the services and facilities provided by the respondent. Complainant's barge was tied to the ship and such mooring would not be possible unless the water berth was dredged deep enough to accommodate the ship and unless the mooring facilities were adequate for the ship. Police protection was also present and not denied to the complainant regardless of the fact that direct vision by the policeman might be difficult. The fire tug was available for protection without extra charge having been levied thus far except for the cost of chemicals used in fire fighting. Both forms of protection had to be paid for by users of respondent's property as well as those who shared in overall benefits, including incidental benefits, of the commission's facilities. The fact that the operators of the ship must also pay charges was considered and not found to be controlling.

"Complainant contends that by definition it is an essential element of wharf tollage that the cargo pass over the wharf and that the charge should be for the use of the wharf to avoid being unreasonable. We do not need to be too concerned about other definitions of wharf tollage. The commission has made a charge to help defray its costs of operating facilities as measured by cargo handled in the area and the only question is whether its facilities are being used and the commission is performing a service reasonably related to its charges. The Examiner considered the evidence and found that it was."

assessed against stevedores or carloaders or other persons for services provided to them or for facilities made available to them and from which they derive benefits. Hence, if a terminal makes a grain spreader available to a stevedore, the Freas Formula does not prevent the terminal from assessing a fair charge for use of that grain spreader. See *Crown Steel Sales, Inc., et al.* v. *Port of Chicago, supra.* The same reasoning applies to a charge against stevedores for benefits received by them in respect to utilization of the terminal facilities.

Chairman Bentley and Commissioners Day and Hearn concur in the view that a charge would lie against stevedores for benefits from utilization of the facilities, but, so they contend, the record fails to disclose that "the practices of respondent in its determination and allocation of costs are reasonable." We disagree with that latter conclusion. This is not a conventional rate case. The proofs required to establish a reasonable relationship between the charges assessed and the benefits received need not be made with anything like the degree of precision required in a rate case. See *Evans Cooperage, supra,* where the Commission allowed a charge, stating at 419:

> In view of the finding that there can be no precise equivalence between services rendered and the charges, we would agree with the Examiner that the record contains no basis upon which reasonable allocation of costs could be made. *Terminal Rate Structure—California Ports,* 3 U.S.M.C. 57, 60, 69 (1948).

Despite absence of basis upon which reasonable cost allocations could be made, the charge was allowed because of an affirmative finding that on the facts of that case there could be no precise equivalence between services rendered and the charge assessed. The same principle applies here.

The error of Chairman Bentley and Commissioners Day and Hearn lies in a too narrow adherence to the principles of the original Freas Formula, entirely overlooking and disregarding the stated objective in *that* case of allocating wharfinger *costs* as between vessel and cargo *only.* Actually, the Freas Formula promulgated in 1948 in *Terminal Rate Structure—California Ports, supra,* has been expanded in *Investigation of Wharfage Charges at Pacific Coast Ports, supra,* to authorize wharfage charges at grain terminals (which terminals did not exist on the Pacific Coast at the time the Freas Formula was adopted) as being wharfinger "special facilities" and in *Crown Steel Sales, Inc., et al.* v. *Port of Chicago, supra,* it was recognized that the Freas Formula "must be varied to recognize local differences in practices, procedures and objectives." That case held, in part, at 373:

> All costs should be apportioned to the various services concerned. There is no question that facility costs are being incurred in connection with (a) stevedoring, (b) truck loading, and (c) wharfage. These costs should be distributed accordingly and the stevedoring

portion recovered by the stevedoring business through their contract rates charged the vessel, the truck loading portion by the terminal operators through their truck loading charges or some tariff charge against the cargo, and the wharfage portion through wharfage charges coupled with reduced rents. Although no exhibit was presented, Mr. Linnekin testified that, using actual costs revealed in respondents' operating statements which were disclosed to complainants, he calculated and applied facility costs in accordance with the service apportionment provisions of the Freas Formula. Eventually, of course, the apportionment of terminal service costs for given commodities, as between cargo and vessel, becomes academic because all such costs as well as those of the water transportation are ultimately borne by the cargo importer.

Chairman Bentley, Commissioners Day and Hearn state:

The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel. Stevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel under past applications of the Freas Formula. As stated above, the cargo benefits by incurring lower loading expenses. The vessel benefits by having to spend fewer days in port for loading operations, thus allowing it to transport more shiploads over a shorter period of time. But no such benefit can be equated to stevedores. In fact, it can be argued that the speed and efficiency of the shipping gallery works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores.

Crown Steel squarely refutes the generalized statement that "The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel."

That statement is also misleading when it "argues" that "less revenues [accrue] to the stevedores." If it means fewer longshoremen are employed and less longshore wages paid, then it is correct. But longshoremen are not parties to this proceeding, and the impact on them was not an issue in the case. If it means what it says that less "revenues" accrue to the stevedoring contractors (Rogers or BARMA) it is incorrect. The record is clear that at this facility stevedores are paid on tonnage of grain loaded to vessel and that stevedore revenue is not computed on longshore labor costs plus a mark-up for overhead and profit or some other formula; hence, the stevedoring rate per ton multiplied by the number of tons loaded establishes the compensation paid to the vessel's stevedore, and this is so whether a given tonnage takes 24 hours to load or 72 hours to load or whether one gang of longshoremen or ten gangs of longshoremen are utilized.[43] Obviously, with a given tonnage loaded to vessel, the shorter the loading period and the fewer longshoremen employed, the greater the profit to stevedore.

Chairman Bentley and Commissioners Day and Hearn further state:

[43]Mr. James F. Carrier, General Manager of Rogers, stated on cross-examination that although he anticipated making a profit of 75¢ per ton on grain loaded and stowed manually in sacks, "percentage-wise" he was happier with the slightly more than 2 cents per ton profit on grain loaded in bulk at Baton Rouge elevator.

". . . We recognize that the costs associated with the use of the shipping gallery are allocable to those who derive an economic and commercial benefit from the use thereof. We do not, however, recognize that the stevedores fall into this recipient category, at least not to the degree as that of the cargo or the vessel . . . Therefore, the allocation of a full fifty percent of the costs of the shipping gallery to the stevedores is an unreasonable practice within the meaning of section 17 of the Act.

They assert in Footnote [39] ". . . this [wharfage] charge would be assessable against the vessel to the extent sought to be imposed on the stevedores." "Wharfage" would be directly assessable against the vessel only if the tariff so provided, and the Cargill tariff herein does not so provide. Under our General Order 15 (46 CFR 533.6(d) (2)), wharfage may be assessed against cargo or vessel or both.[44] Whether the ultimate cost may end up as being for the expense of the vessel turns on the terms of the applicable sales contract and charter party. But even if that is the ultimate end result, it is no answer to our problem. *Rates of Pacific Northwest Elevators Ass'n, supra,* at 388. There is neither reason nor logic, other than General Order 15, to restrict the charge to cargo *or* to vessel if in fact an interest other than cargo or vessel receives a direct benefit from use of the facility. This is recognized in *Crown Steel, supra,* when part of the costs of the facility were allocated to stevedoring, part to truck loading, and part to wharfage (cargo), whereas on the Pacific Coast all "this cost is allocated to wharfage." In fact, where two different persons each receive a benefit from a given facility, we have often held it improper to assess the entire charge for that benefit against only one of the recipients. No one contends that the stevedore is not using the terminal facilities and services furnished by Cargill or that the stevedore does not receive some benefit therefrom. Footnote [39] would do violence to the principle that each recipient should bear its fair share of the charge when it states that the 5¢ charge "would be assessable against the vessel to the extent sought to be imposed on the stevedores."

From the above-quoted statements of the majority, it is implicit the majority recognizes that stevedores are recipients of benefits from the efficiency of the shipping gallery, albeit, so they contend, not "to the same extent as does either the cargo or the vessel *under past applications of the Freas Formula*" [45] (underscoring supplied) and "the steve-

[44]In Footnote [39] the majority labels (or likens) the charge assessed for the use of the shipping gallery to "wharfage". "Wharfage", however, as defined in 46 CFR 533.6(d) (2) is a charge assessed against cargo or vessel for the movement or passage of cargo "over, onto, or under wharves or between vessels . . . when berthed at wharf". It is solely a charge for use of the wharf and does not cover the cost of services or the use of any equipment, such as the shipping gallery by which the cargo is moved to the wharf. The shipping gallery here is a piece of equipment similar in its function to a gantry crane or a pipeline. A fee for the use of the shipping gallery may be assessed, therefore, in addition to and separately from "wharfage", just as fees are charged for the use of gantry cranes, forklifts or other terminal equipment as listed in the tariffs of terminal operators generally, and of the Baton Rouge Port Authority specifically.

[45]Under the Freas Formula costs and charges were distributed initially to vessel and cargo. Generally, expendi-

dores fall into this recipient category, . . . [but] not to the degree as that of the cargo or the vessel" and "a portion of this remaining fifty percent is allocable to" stevedore and a portion to the vessel.

Here, then, is the crux of our differences. The majority, while recognizing that stevedores are users of the facilities and do receive a benefit therefrom, would disallow all charges against the stevedores solely on the basis that while in past cases costs were allocated, on a judgment evaluation of benefits, 50% to cargo and 50% to vessel, here Linnekin failed to apportion the vessel's 50% of the benefits (or costs) as between stevedore and vessel. Thus, they reason, when cargo is benefited to 50% and vessel and stevedore combined are benefited by a given facility for the remaining 50%, to allocate this full remaining 50% to stevedores only is an unreasonable practice. But it automatically follows that to deny all charge against stevedores because of an imperfect allocation would result either in imposing all 50% against vessel or would deny Cargill a fair monetary return, and if the first allocation (all to stevedore) is an unreasonable practice when the two interests (stevedore and vessel) benefit, then the latter allocation (all to vessel, as recommended by the majority in Footnote [29]) must also be an unreasonable practice.[46] But the basic issue here is not whether stevedores should have been allocated 50% or 40% or 20% or 5% of the aggregate benefits, but rather whether the 5¢ charge is fairly related to the benefits actually received by stevedores. We find the record establishes such fair relationship. Finally, under *Volkswagenwerk,* there need be only a reasonable relationship between benefit and charge—not the strict mathematical and direct relationship between rates and fully allocated costs as required in a domestic rate case and which the majority appears to apply to this case.

With respect to dock cleaning, no one disputes that grain spillage creates a safety hazard which requires periodical cleaning of the grain dock. BARMA's witness recognized that at one time two men spend 8 or 9 hours washing down the dock with hoses. Considering that cleaning can be done only when the dock is empty and keeping in mind that ships often dock at short intervals or even one right following the other and are loaded at any time during the day or at night, it is evident that dock cleaning cannot be done after every vessel. The $50 per vessel charge therefore is no more than a reasonable and fair

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tures were assigned to the activities in whose furtherance they have been incurred. Contributions of both labor and facilities were measured by the proportionate use made thereof. Proportionate use was determined generally on a time, space, or value basis where possible; otherwise, judgment was used (*Terminal Rate Structure—California Ports, supra,* at 61–62). Judgment was the determinant in arriving at the proportionate uses of the wharf and shipping gallery in the instant case.

[46] *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966) at 549.

method of uniformly allocating the cost of dock cleaning, whether or not it is done after every vessel.

It is of more than passing interest to note that BARMA stated on this record there would be no great difference to competing stevedores if the charge in question is assessed provided Rogers does not compete for stevedore business at this facility.[47] This comment is indicative of the fact that one of BARMA's primary purposes is to force Rogers to cease doing business at the facility rather than to eliminate the charge assessed equally against all stevedores.

Mr. Linnekin's formula for allocating costs and services between cargo, vessel, and stevedores constitutes a fair and equitable method of allocating costs amongst those interests and establishes a reasonable relationship between the charges assessed and the services and benefits provided.

The stevedoring contractor who charges an agreed rate *per ton* loaded into the vessel benefits directly from the increased loading capacity of the Port Allen grain elevator as well as from the high efficiency of its loading equipment, including the shipping gallery and the grain dock-wharf.

There is a reasonable relationship between the charge to stevedores and the benefits received by the stevedore from the services and facilities including dock cleaning and liaison services.

In turn, Cargill is entitled to compensation for these provided services and facilities.

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[47]Tr. of Oral Argument of March 7, 1973, pages 46–47:

"Commissioner Morse: It seems to me I saw somewhere in the brief, perhaps not in your brief, . . . an allegation to the effect that . . . this type of . . . a shipping elevator, should not be permitted to . . . also conduct stevedoring operations on the premises.

Mr. Bagley [Counsel]: Yes, I think that the elevator has a choice, that it should be made by this Commission to have a choice.

"If it does not compete with stevedores, it will really make no great difference to stevedores, whether or not such a charge is imposed on them.

"In other words, if a reasonable and proper charge should be made by an elevator against some part of the shipping operation and there is no competition between the elevator through its subsidiary or its affiliate with the stevedores working at the elevator and all stevedores are standing in the same position and each one is an independent contracting stevedore, not an affiliate, then the fact that this charge is imposed uniformly across the [board] on each of these stevedores will not in any manner affect their competitive relationship."

The assessment in question was 5¢ per ton at the time the case was heard by the Administrative Law Judge, but will be subsequently raised to 8¢ per ton. BARMA's basic fear is further explained in the following colloquy (Tr. of Oral Argument of March 7, 1973, page 50):

"Mr. Bagley: I think that where you have a tax imposed upon one or two competitors and the tax is imposed by the parent of the one, the house stevedore, you fairly obviously have in the hands of the parent and its subsidiary, the right to control competition between those two.

"I frankly do not recall those figures that were referred to today. But, any time that Cargill wants to put Baton Rouge Marine Contractors out of business, all it has to do is lower the rates by Rogers to something which will be below Baton Rouge Marine Contractors.

"When it does, this Cargill will have a five cent increment which will be profitable on every ton it loads, which will be compensation received by it over and above its cost load.

"We say that in this is the danger which we do not believe should be allowed by this Commission under an agreement regulated by it."

The record discloses that Cargill has never failed to assess the 5¢ charge against Rogers.

The assessment of the charges against stevedores is necessary in order that Cargill achieve a fair return on the leased facilities.

Therefore, we conclude that the charge sought to be assessed against all stevedores operating at the Cargill-leased facility is reasonably related to the economic and commercial benefits derived by the stevedores and the assessment thereof is a just and reasonable practice within the meaning of section 17 of the Act.

The Order. We object to the breadth and scope of that paragraph of the Order which provides:

> It is further ordered, That no charge to stevedores for use of respondent's services and facilities based upon allocations of costs found therein to be unreasonable may be imposed by respondent until such charge has been found reasonable on remand and until a tariff reflecting such charge has been filed with the Commission.

In our opinion, and on this record, we have no jurisdiction to issue an order which forbids *any* charge against stevedores until such charge has been found by us to be reasonable. On this record, and for the period of time to which the record speaks, four of five Commissioners have found that respondent provided services and facilities to stevedores and that stevedores received benefits therefrom for which *a* charge could be assessed—only the level of the charge being unresolved by us. Had the above-quoted order been restricted to the 5¢ charge and to the period of time covered in these proceedings, there conceivably might be support, in law, for such order. But it is not so restricted, for on its face it is broad enough to apply to a charge of *less* than 5¢ applicable during the period covered by this record and which charge may be supportable by other cost allocations or modifications of those cost allocations used in this proceeding and even to a new charge established as of today based on today's costs and benefits and which respondent might now file with us under our General Order 15, 46 CFR 533. In our opinion we may not, even on this record, prohibit either of such new filings for it amounts to an exercise of injunctive power which on this record and in this situation we do not have. *Transpacific Freight Conf. of Japan* v. *FMB*, 302 F.2d 875 (D.C. Cir., 1962).

Our jurisdiction over tariff filing practices of terminals is based on Section 17, Shipping Act, 1916, and upon our General Order 15, 46 CFR 533. It is inherent in General Order 15 that a terminal tariff rate filing is effective the day the tariff is filed with us unless the filing itself specifies a deferred effective date.[48] As to terminal tariff filings, we do not have suspension authority as we do have in respect to tariff

[48] As originally proposed General Order 15 would have required 30 days' advance filing of terminal tariff rates, rules, and regulations. The 30-day rule was objected to because of lack of authority to prescribe such advance filing and the requirement was dropped. 30 Federal Register 12681 (1965).

filings by common carriers in our domestic offshore commerce under Section 3, Intercoastal Shipping Act, 1933 (46 U.S.C. 845), nor do we have specific statutory authority to reject a terminal tariff filing as we do have in respect to filings by common carriers by water in our foreign commerce under Section 18 (b) (4), Shipping Act, 1916 (46 U.S.C. 817).

Hence, if we have terminal tariff rejection authority, absent a hearing and a finding of a violation of the Shipping Act, 1916, it is only when based on the premise that the filing is so defective in form or substance as to be patently a nullity as a matter of substantive law and that administrative efficiency and justice are furthered by such rejection. *Municipal Light Board etc.* v. *Federal Power Commission,* 450 F.2d 1341 (D.C. Cir., 1971). We do not have such a nullity before us. See also *Arrow Transportation Co.* v. *Southern Ry Co.,* 372 U.S. 658 (1963); *United States* v. *Scrap,* 412 U.S. 669, 697–699 (1973); *Continental Air Lines* v. *CAB,*, ___ F.2d ___ (D.C. Cir., 1974); *Rejection of Tariff Filings,* 13 F.M.C. 200 (1970); *Australia/Atlantic and Gulf Conference,* 16 F.M.C. 27, 32 (1972).

The effect of the Order is even more drastic than a suspension order. It purports to give us jurisdiction to approve the level of a rate before the rate may become effective and with no limit on how long our determinations may require. That quoted portion of the Order is illegal and void for want of jurisdiction.

Commissioner George H. Hearn, concurring and dissenting:

I agree that there are no violations of section 16. As to section 17, I concur in the conclusions set forth by Chairman Bentley and Commissioner Day. I disagree with the conclusion with respect to section 15, and find a violation thereof.

It is to some degree true that the lease agreement between Cargill and the Port permits Cargill a broad range of discretion on matters concerning operation of the terminal; but as concluded by the Administrative Law Judge it is not apparent that the agreement permits the type of activity engaged in by Cargill with respect to stevedores. Substantial evidence of the initial intended and approved perimeters of the agreement can be found in the statement of one of the parties. The General Counsel of the Port Commission requested Cargill to at least postpone the imposition of the charges and conditions until approved by the Commission.[49]

[49]Initial decision, fn. 10 and accompanying text.

This insistence on adherence to the terms of an agreement is crucial to the continued existence of the right of persons dealing with conferences and other groups enjoying antitrust exemptions under section 15 to know how they may reasonably expect to be affected by the concerted activity of such groups.[50]

If one of two parties to an agreement cannot find authority in the agreement for the specific activity, it must be presumed that third parties will be in no more advantageous position to construe the agreement.

Clearly, the filing and approval requirements of section 15 cannot be defeated by the contention that the modification of the agreement is unilateral. It has been recently held [51] that the fact of there being parties to an agreement not subject to the Shipping Act does not remove the agreement from section 15 jurisdiction. Were it otherwise parties to an agreement could avoid FMC jurisdiction by the simple device of including a person not subject to the Act.

Similarly, to accept Cargill's argument would allow parties as herein to avoid approval of agreement modifications by formulating them as the acts of only one party.

(S) FRANCIS C. HURNEY,
Secretary.

[50] *Pacific Coast European Conference—Rules 10 and 12*, 14 F.M.C. 266, 278 (1971). See, also, *Joint Agreement —Far East Conference and Pacific Westbound Conference*, 8 F.M.C. 553, 558 (1965).
[51] *NYSA & ILA* v. *FMC*, ___ F.2d ___ (1974).

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

ORDER

The Commission has this day entered its Report in this proceeding which is hereby made a part hereof by reference.

Therefore, it is ordered, That respondent cease and desist from assessing those charges and imposing those conditions found to be unlawful therein.

It is further ordered, That this proceeding be, and the same hereby is, remanded to the presiding Administrative Law Judge for further proceedings to determine the proper charge, if any, assessable against complainant and those similarly situated for services and facilities provided by respondent which are properly allocable to complainant and those similarly situated.

It is further ordered, That the presiding Administrative Law Judge issue a supplemental decision of his findings in the proceeding on remand.

It is further ordered, That should it choose to impose certain conditions, respondent immediately file with the Commission a tariff reflecting those conditions, within the guidelines set forth in our Report herein, sought to be imposed.

It is further ordered, That no charge to stevedores for use of respondent's services and facilities based upon allocations of costs found therein to be unreasonable may be imposed by respondent until such charge has been found reasonable on remand and until a tariff reflecting such charge has been filed with the Commission.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74–9

CONSOLIDATED INTERNATIONAL CORPORATION

v.

CONCORDIA LINE, BOISE GRIFFIN STEAMSHIP COMPANY, INC. AS AGENTS

NOTICE OF ADOPTION OF INITIAL DECISION

Jan 9 1975

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 9, 1975.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74–9

CONSOLIDATED INTERNATIONAL CORPORATION

v.

CONCORDIA LINE, BOISE GRIFFIN STEAMSHIP COMPANY, INC. AS AGENTS

An agreement to settle a proceeding brought under Section 22 of the Shipping Act, alleging a violation of Section 18(b)(3) of the Shipping Act, can be approved only upon an affirmative finding that such violation occurred.

Cameras and enlargers are within classification of "machines" under respondent's tariff. "Machines" include any device consisting of static or moving parts (or both) which utilize and convert energy, motion or force from one form into another to perform a useful function.

Settlement of reparation proceeding approved, with modification.

C. J. Meyers (Mrs.) and *William Levenstein* for complainant.
Stanley O. Sher for respondent.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE [1]

By complaint filed pursuant to the provisions of Section 22 of the Shipping Act, 1916,[2] and served February 25, 1974, Consolidated International Corporation, complainant, asks reparation in the amount of $7,530.73, with interest, from Concordia Line, respondent. The claim arises from fourteen shipments of cameras, photographic enlargers and their parts from Alicante, Spain to Philadelphia, Pennsylvania aboard respondents ships during the period from December 24, 1972 through November 30, 1973. By joint motion, the complainant and respondent request authorization to settle for the full amount of the claim, but without interest.[3]

[1] This decision became the decision of the Commission 1/9/75

[2] 46 USC §821.

[3] The complaint does not contain an express prayer for interest, but it does pray for "such other sums as the Commission may determine to be proper as an award of reparation." The quoted term has been construed by the Commission as a prayer for interest. However, by subsequent agreement, a shipper, injured because it was assessed an unlawful rate, may elect to waive interest on its claim. *United States Borax & Chemical Corporation* v. *Pacific Coast*

Briefly, the complaint alleges violations of Section 18(b)(3) of the Shipping Act, 1916,[4] in that the respondent charged and collected the tariff rate for Cargo, N.O.S. for the fourteen shipments, instead of the tariff rate for Business and Industrial Machines, N.O.S. The answer consists of what is, in effect, a general denial and three affirmative defenses.

Inasmuch as the answer also states that the respondent cannot determine whether to consent to shortened procedure on the present state of the record (an interesting allegation in the light of subsequent events), I urged the parties to confer with a view toward entering into a stipulation of facts which would permit disposition under the shortened procedure of Rule 11 of the Rules of Practice and Procedure.[5]

The parties conferred and, after some delay, they filed a stipulation of facts, accompanied by a letter from complainant requesting a belated briefing schedule. The respondent did not explicitly alter its representation concerning shortened procedure, but it did acquiesce in the briefing schedule suggested by complainant. Since the briefing proposal expressly invoked Rule 11 procedures, the respondent is deemed to have assented to the conduct of this proceeding without the need for oral hearing.

The briefing schedule which the parties requested was approved but briefs were not filed. Before the due date for the opening brief, respondent made its offer of settlement. By letter, the complainant advised me of the offer and of the forthcoming motion to approve the settlement. In addition, complainant wrote that "the offer to settle obviates the necessity for going forward with briefs." The meaning of the quoted remark is not entirely clear, but in the context of the limited scope of the stipulation and motion (both printed in full, below) it raises this threshhold question—When an offer of settlement is made and accepted by the parties to a reparation proceeding is the Commission nevertheless required to exercise its decisional function [6] by making findings and a judgment on the merits or is it simply obliged to mechanistically place its imprimatur of approval on the arrange-

European Conference, 11 FMC 451, 470 (1968). In any event, the award of interest is discretionary on the part of the Commission. *Flota Mercante Grancolombiana, S.A.* v. *Federal Maritime Commission*, 373 F 2d 674, 681, (D.C. Cir. 1967).

[4] 46 USC §817(b)(3). It provides, as pertinent: "No common carrier by water in foreign commerce or conferences of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs."

[5] 46 CFR 502.181–502.187. Under Rule 11 a complaint proceeding may be conducted under shortened procedure, without oral hearing, with the consent of the parties.

[6] It is the function and power of the presiding Administrative Law Judge to act upon offers of settlement. Rule 10(g) of the Rules of Practice and Procedure, 46 CFR 502.174.

ment. In my judgment, the Commission is not relieved of the decisional responsibility in these circumstances.

It is true that the Commission is guided, generally, by the principle that settlements of controversies are to be encouraged,[7] but this approach is available only within the boundaries of the underlying statutory scheme, which, as provided in Section 18(b)(3), directs common carriers to collect the rates and charges specified in their tariffs and forbids rebates, remissions or refunds of lawful charges. It follows that an agreement to settle a proceeding, brought under Section 22 of the Shipping Act, alleging a violation of Section 18(b)(3), can be approved only upon an affirmative finding that such violation occurred. Cf. *Ketchikan Spruce Mills* v. *Coastwise Line*, 5 FMB 661, 662 (1959); cf., also, Rule 6(c) of the Rules of Practice and Procedure 46 CFR 502.93, applicable to Special Docket applications which provides, in pertinent part, that "satisfied complaints will be dismissed in the discretion of the Commission." Here, to support a finding of violation, it must be shown that the respondent did charge and collect a greater compensation than its tariffs authorized. With the foregoing discussion in mind, it is appropriate to go on to the facts of the matter.

The parties stipulated to the following facts pertaining to the fourteen shipments: [8]

1. The complainant is incorporated in the State of Delaware. It is located at 4501 South Western Boulevard, Chicago, Illinois. Its principal business is the Marketing of graphic arts equipment.

2. The respondent is a common carrier by water in the trade from Spain to U.S. North Atlantic Ports and is subject to the jurisdiction of the Federal Maritime Commission in accordance with the provisions of the Shipping Act, 1916, as amended.

3. The complainant paid and bore the freight charges assessed by respondent for the shipments in controversy. Said charges were paid less than two years prior to the date the complaint was filed with the Federal Maritime Commission.

4. All of the shipments in question were transported by respondent from Alicante, Spain, to Philadelphia, Pa., U.S.A.

5. All of the shipments in question consisted of one or more of the following articles:

(a) Consolidated Fast Darkroom Cameras, 24" size, approximately 10' long, by 4'7" wide by 6'9" high.

(b) Consolidated C-16 Color Enlargers, approximately 8'6" long, by 3'8" wide, by 5' high, weighing approximately 2085 pounds.

[7] *Merck, Sharp & Dohme International A Division of Merck & Company, Inc.* v. *Atlantic Lines*, 14 SRR 232, 235 (1973), adopted SRR (January 2, 1974).

[8] The stipulation encapsulates material set forth more comprehensively in the complaint.

(c) Consolidated Super 100 Cameras, approximately 12' long by 3'10" wide, by 6'3" high.

(d) Lensboard Assemblies, Rear Cases, Vacuum Packs and Copyboards.

6. The articles shipped are all used commercially in the Graphic Arts industry and for commercial photography and are fully described in Attachments 1, 2, and 3.[9]

7. At the time the shipments moved, page No. 53 of respondent's tariff (Spain/U.S. North Atlantic Westbound Freight Conference Tariff F.M.C. No. 6) specified rates for "Cargo, N.O.S." and page No. 66 published rates for "Machines, N.O.S.", "Machines, Business, N.O.S." and "Machines, Industrial, N.O.S." There are no qualifications restricting these descriptions. The rates for the three "Machines" entries are identical.

8. Respondent's tariff does not list any article specifically describing Cameras, Enlargers or parts for Cameras or Enlargers.

9. Respondent's tariff, effective at the time the shipments in question moved, provided in Rule 3, page 22, as follows:

Shipments of Parts: Integral parts of commodities listed herein, unless otherwise specified, will be accorded the rate basis for the commodity.

10. Complainant contends that the applicable rates for the transportation services rendered by respondent in connection with the 14 shipments in question are those published in Spain/U.S. North Atlantic Westbound Freight Conference Tariff F.M.C. No. 6 for "Machines, N.O.S.", and that it has overpaid respondent the sum of $7530.73 for the 14 shipments.

The motion for authorization to settle reads as follows:

The parties have agreed to settle the claims which are the subject of the complaint in this proceeding, as follows:

1. Respondent will pay complainant the sum of $7,530.73, without interest, in settlement of the 14 claims listed in the complaint.

2. The parties agree that said settlement should be based upon the rates published in Spain/U.S. North Atlantic Westbound Freight Conference Tariff F.M.C. No. 6 for "Machines, N.O.S.", with due regard to the Stipulation of Facts filed June 17, 1974.

3. Payment will be made within 30 days from the date of Commission authorization.

4. A Motion to dismiss the proceeding with prejudice will be made by complainant upon receipt of payment.

[9]The attachments are advertising brochures containing the specifications of the commodities transported. Attachment 1 describes the Consolidated Fast Darkroom Camera; attachment 2—the Consolidated C-16 Color Enlarger; Attachment 3—the Consolidated Super 100 Camera and parts shown in paragraph 5(d) of the stipulation.

The parties request authorization to make the aforesaid settlement.

The stipulation and motion do not present the entire picture. However, when their contents are read in conjunction with the complaint, it seems reasonable to conclude that the parties intend to agree that the respondent charged the higher "cargo" rate [10] for the shipments, but that the respondent now concedes that it should have charged the lower "machines" rate.[11] Respondent's reason for the application of the "machines" rate rather than the "cargo" rate is left unstated. Thus, despite any presumption favoring the fairness, correctness and validity of the settlement,[12] there remains the question whether the cameras and enlargers are classified as "machines" or whether they take the broader classification of "cargo", since there is no specific tariff classification for cameras or enlargers. This is the issue on which approval of the settlement turns.

The brochures disclose that the enlarger and the cameras have components consisting of a complex of moving and stationary parts. Some of the parts are powered electrically while others, such as worm gears, are operated manually. To state the obvious, the cameras are designed to photograph particular copy on film and the enlarger is designed to enlarge or reduce filmed transparencies. Conforming to applicable precedent, those qualities entitle the commodities and their parts to be classified as "machines."

In *United Nations Childrens Fund* v. *Blue Sea Line*, 12 SRR 1067 (1972), the carrier initially assessed a lower "machinery" rate for commodities, but later rebilled the shipper at a higher "cargo" rate for the shipment there involved. In dealing with the question of which rate was applicable as a matter of novel impression, the Commission explained that in a tariff interpretation problem the threshhold determination is whether there is an ambiguity in the tariff and, if it is found to exist, to then strictly construe the tariff provisions against the carrier, resolving any doubt in favor of the shipper, 12 SRR at 1069–1070; see also, *United States* v. *Interstate Commerce Commission*, 198 F. 2d

[10] Page 53 of respondent's tariff, which specifies the rate for "cargo" was revised several times during the pertinent period. At the time of the first three shipments the contract rate was $106.25 W/M, per 2nd revised page 53, effective December 19, 1972; the same rate remained in effect at the time of the fourth shipment, per 3rd revised page 53, effective March 6, 1973; at the time of the next seven shipments the rate was $117.00 W/M, per 5th revised page 53 in effect when the last 3 shipments were made, but the rate for all W/M basis rates were increased by $2.50 per 2nd revised page Title A, effective September 25, 1973; at the time of the last shipment there was a 7% bunker surcharge, per 3rd revised page 49, effective November 18, 1973.

[11] Page 66 of respondent's tariff, specifying the rate for "machines" was also revised a number of times during the pertinent time period. Per 4th revised page 66, effective November 7, 1972, in effect at the time of the first shipment, the contract rate was $81.50 W/M; the rate remained the same for the next three shipments, per 5th revised page 66, effective February 6, 1973; the rate for the following six shipments was $89.75, per 8th revised page 66, effective September 20, 1973; 9th revised page 66, effective September 12, 1973, in effect at the time of the last four shipments retained the rate shown in 8th revised page 66, but the last three shipments took the $2.50 increase noted in n. 10, *supra*, and the last shipment took the 7% bunker surcharge mentioned in n. 10.

[12] See n. 7, *supra*.

958, 966 n. 5 (D.C. Cir. 1952). The Commission went on to find an ambiguity by virtue of the fact that the commodities could come within either of the two classifications. In reaching that result, the Commission found that the definition of "machine" includes any device consisting of static or moving parts (or both) which utilizes and converts energy, motion or force from one form into another to perform a useful function.

Thus, applying the usual canons and techniques of interpretation and noting no real uncertainty as to the tariff standard, see *National Daily Products Corporation-Kraft Foods Division* v. *Missouri-Kansas-Texas Railroad Company,* 385 F. 2d 173, 177 (5 Cir. 1967), I find that the cameras and the enlargers, are "machines" and that respondent should have charged the rate for that classification.[13] "Where a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable.[14] And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates." *United States* v. *Gulf Refining Company,* 268 U.S. 542, 546 (1925); Accord: *Norfolk and Western Railway Company* v. *Permaneer Incorporated,* 455 F. 2d 76, 78–79 (8 Cir. 1972).

I find that the respondent charged, demanded and collected a greater compensation for the transportation of property than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time of the fourteen movements in violation of Section 18(b)(3). The motion for authorization to settle is granted and respondent is ordered to pay complainant the sum of $7490.86,[15] without interest, in full settlement of this reparation proceeding within 30 days. This is a final order and it hardly seems necessary to require complainant to file another motion to dismiss the proceeding with prejudice as the motion to settle would have the complainant do upon receipt of payment.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
December 13, 1974.

[13]Given the classification of "machines" in respondents tariff, it is inexplicable why respondent's agent rejected the implementation of that rate for cameras and enlargers on January 4, 1974, in the following words: "With respect to the above account and your memo dated October 18, 1973 attaching invoices covering various shipments on Concordia vessels covering reproduction machinery and requesting refunds for same. We regret we cannot alter the rates as assessed since our tariff does not provide any classification for these machines. Thus, general cargo rates are applicable."

[14]Citations omitted.

[15]In computing its claim for refund for the twelfth shipment made on October 4, 1973, claimant overlooked the $2.50 rate increase which went into effect on September 25, 1973. Recalculated, the claim must be reduced by the sum of $39.87.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–39

OCEAN FREIGHT CONSULTANTS

v.

ROYAL NETH. STEAMSHIP CO.

Reparation granted.

Henry S. Wegner for Complainant.
A. J. Rosner for Respondent.

REPORT

Decided Jan 27 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman* and James V. Day, *Vice Chairman*)

This proceeding comes before the Commission on a petition for reconsideration filed by Ocean Freight Consultants (OFC), following the issuance of the Commission's Notice of Adoption of Initial Decision. In his Initial Decision, Administrative Law Judge Stanley M. Levy dismissed OFC's complaint, determining that OFC had not sustained its case, failing to shoulder its heavy burden of proof.

FACTS

OFC instituted this proceeding as assignee of Johnson & Johnson International, seeking reparation in the amount of $383.44. OFC contended that Respondent Royal Netherlands Steamship Company (RNS) erroneously assessed a freight rate higher than that payable under the tariff. The circumstances follow.

On April 23, 1971, Respondent's vessel, the CHIRON, sailed from New York to Puerto Cabello with, among other items, 27 bags of Cab-O-Sil, measuring 184 cubic feet, weighing 459 pounds. The bill of lading, dated April 23, 1971, listed these items as 27 bags of Cab-O-Sil

and assessed to this cargo the Cargo, N.O.S. rate of $86 per 40 cubic feet. Upon arrival in Puerto Cabello, the vessel was unloaded, the cargo claimed by the consignee, and the freight paid.

On post audit, the shipper discovered the alleged error and, on October 22, 1971, filed a claim with the carrier for $395.60, alleging that the cargo in question was 99 percent silicon dioxide and should have been rated at $53 per 2,000 pounds, the rate for silicon dioxide under Respondent's applicable tariff. The carrier rejected OFC's claim by letter of November 10, 1971, on the basis of a tariff rule requiring that articles be described not by their trade names but rather by the common name applicable to said articles.[1]

In support of its position, Complainant provided a letter from the manufacturer of "Cab-O-Sil", confirming that the product is, in fact, 99 percent silicon dioxide. Additionally, Complainant presented a statement from the chairman of a conference not here involved supporting its position.

THE INITIAL DECISION

Judge Levy dismissed the complaint, concluding that:

> [This] . . . is not a case of inadvertent misdescription. The choice of description was clearly before the shipper. It elected a particular description. The tariff provided different rates in accordance with the description selected by the shipper.

Complainant in its exceptions took issue with the Administrative Law Judge's findings and argued that his decision opens the door to the "very discriminations and prejudices that section 18(b) of the Shipping Act was designed to preclude." OFC cited pertinent portions of the Harter Act in an attempt to show thatthe carrier has certain responsibilities to determine that what is actually shipped is in fact described on the bill of lading, contending that the carrier should not be permitted to profit from its failure to assure that the bill of lading properly describes the shipment. In conclusion, Complainant submitted that it had presented uncontroverted evidence as to what was shipped. Respondent did not raise any issues as to the proof of what was actually transported.

Respondent, in its reply, restated its position that under the applicable provision of the Conference's tariff, the carrier can only assess the

[1]Item 2(h), original page No. 9 of U.S. Atlantic & Gulf Venezuela & Netherlands Antilles Conference, Freight Tariff F.M.C. No. 2, states:

> Bills of Lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions appearing herein. Bills of Lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S. as minimum.

Cargo, N.O.S. rate to articles described by trade names only on bills of lading.

By Notice of October 29, 1973, the Commission, having reviewed this case on exceptions and replies, adopted the Initial Decision albeit on dissimilar grounds. In its present petition for reconsideration, OFC again urges that it must have sustained its case since its evidence is uncontradicted. Additionally, OFC claims that insufficient treatment was given OFC's Harter Act claims as to the burden imposed upon a carrier.

DISCUSSION AND CONCLUSION

We have reviewed the record of this proceeding in light of the issues raised in the pending petition for reconsideration and have concluded that reparation should be granted. We think that by the evidence presented by Complainant, which is unrefuted by Respondent, the Complainant has been shown to have met the heavy burden of proof which must be sustained in cases such as this. The record evidence shows without contradiction that "Cab-O-Sil" consists of 99% Silicon Dioxide and therefore should have been so rated by Respondent. We have also spent a great deal of time and exertion in examining the defense relied upon by Respondent herein. We conclude that the defense put forward merits discussion here.

Respondent alleges that the rule in his applicable tariff mandates the application of a Cargo, N.O.S. rate to cargo described by trade name only. We have accepted a similar defense with respect to a tariff rule regarding contested weights or measures of cargo in our recent case of *Kraft Foods v. Moore McCormack Lines, Inc.* There is, however, a glaring dissimilarity between this case and *Kraft*. In the *Kraft* case we permitted the carrier to rely upon a tariff rule which stated, in pertinent part:

> Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier.

There, the rule was clearly stated and left the carrier no discretion, either to consider or refuse to consider a claim filed with it after the cargo had left its custody. This is clearly distinguishable from the rule with which we are here presented.

The applicable rule sought to be relied upon in the present proceeding permits a carrier to apply the Cargo, N.O.S. rate *as a minimum* to cargo described by trade name only. This sort of flexible standard presents the opportunity for discrimination between shippers and as such cannot be relied upon by a carrier.

Since we will not allow reliance on the rule here, the shipper is free to show, by whatever evidence he may adduce, the nature of the cargo transported. If he can do so in satisfaction of the heavy burden of proof placed upon him, he is entitled to reparation. Here, we conclude that Complainant has sustained his burden. His evidence is unrefuted and therefore, under our rules,[2] is accepted as fact.

We hasten to add, however, that we confess sympathy for a carrier faced with rating a cargo described only by trade name. His position is as defenseless as was the carrier's position in *Kraft Foods*. That being so, we note that in the future, we are inclined to look more favorably upon a defense such as that proposed here *provided* the rule sought to be relied upon is, in fact, a rule. Should such a rule mandate the application of the Cargo, N.O.S. rate to cargo described by trade name, not "as minimum" but as the only rate applicable, we would be more favorable to sustaining reliance on that rule. We are unable to do so here, however, for the reasons stated above.

We note the disagreement of Commissioners Barrett and Morse with our conclusion as to the validity of the rule here in question. That dissent, however, is premised on hypothetical facts which obviate the need for a rule such as that before us. The need for a "trade name rule" arises when the carrier is not informed of the commodity being shipped except by its trade name description. To assume, as do Commissioners Barrett and Morse, that a determination of the proper rate (whether Cargo, N.O.S. or higher rates under a discretionary rule) will be made by the carrier's agent also assumes perforce that that agent knew the actual description of the commodity shipped. In such a case there would be no need for a rule such as Item 2(h) because the person rating the shipment would know what the rule assumes he does not know.

Reparation granted.

Commissioner George H. Hearn, concurring and dissenting:

The Commission issued its original decision in this case [3] on October 29, 1973. I am now glad that the interval has brought two other members of the Commission into agreement with at least the result of my dissenting opinion on that first occasion when I would have granted reparation. However, I am unable to accept the rationale of Chairman Bentley and Commissioner Day. I do not agree either with their treatment of the tariff rule (or with that of Commissioners Barrett and Morse) or with their gratuitous advice as to an "acceptable" rule.

[2] Rule 5(d), 46 CFR §502.64.
[3] Adoption of Initial Decision, 14 SRR 139.

Chairman Bentley and Commissioner Day reject the respondent's defense based on the tariff rule, and I agree. My decision to grant reparation, however, is based solely on the complainant's ability to meet its burden of proof, and not on the wording of respondent's rule. There is no need, therefore, to distinguish between the tariff rule in this case and the one in *Kraft Foods v. Moore McCormack Lines, Inc.*,[4] or to decide whether the words "as minimum" are determinative.[5]

In essence the Bentley/Day and Barrett/Morse views are no different. They disagree only as to the effect of the words "as minimum". Ultimately, under both views, if the tariff rule is in "proper" form the shipper is to be denied reparation *ipso facto*. The intent either way is evident in the Bentley/Day opinion: here the carrier's "position is as defenseless as was the carrier's position in *Kraft Foods*". The result is that not only does the majority provide the carrier with a defense but with an irrebuttable presumption, rendering the shipper actionless.[6]

Inasmuch as I concur in the grant of reparation in this case, we will have to await another case to see the possible full effect of the majority view. Thus the advice offered in the Bentley/Day opinion on how to defeat shippers' claims is not just a matter of "sympathy" for carriers' "defenselessness" but a forecasting of a misapplication of section 18(b) of the Shipping Act further to that of *Kraft*.

The claimant here bases its claim in part on the Harter Act, 49 U.S.C. 193, which places on the carrier the burden of issuing the bill of lading to the shipper. It may be that this does not provide grounds for an action under the Shipping Act.[7] Yet, the provisions of the Harter

[4] 14 SRR 603 (1974), Petition for Reconsideration denied December 13, 1974.

[5] While I agree with Commissioners Barrett and Morse that their "trade-name rule is but an extension of *Kraft*", there is no error as they ascribe to me concerning trade-name cases and misrating cases. Rather I find the error to be in their majority *Kraft* decision in the first instance and would allow a complainant to meet the burden of proof in all these cases, regardless of the type or existence of a tariff rule.

[6] It is unnecessary for me to decide the effect of the words "as minimum". I find the use of the tariff rule (with or without those words) as a means of barring reparation to result from an improper interpretation of section 18(b)(3) of the Shipping Act. (See my dissent in *Kraft*, 14 SRR 603, 606.) If, however, it were necessary to decide the validity of the tariff rule with and without "as minimum", I could not choose because I find both invalid when used as a bar to shippers' claims. Without those words the rule is unlawful for the reasons set forth in the Barrett/Morse opinion. With "as minimum" the rule is unlawful because it discriminates between two types of shippers: one whose shipment would qualify for a commodity rate higher than the Cargo, N.O.S. rate and another whose shipment would qualify for a lower than Cargo, N.O.S. rate. As to the former the Barrett/Morse rule would require application of the commodity rate, leaving the shipper unpenalized and no worse off than if he had not used the trade name. As to the shipper whose cargo would take a lower than Cargo, N.O.S. rate, the Barrett/Morse rule would mandate the Cargo, N.O.S. rate, penalizing the shipper for using the trade name. Thus the shipper of lower rated goods would be penalized for using the trade name, but not the shipper of higher rated goods. This is unfair and unlawfully discriminatory treatment. (See, *e.g.*, *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16, 21 (1970).) These difficulties in agreeing upon and formulating a rule which conforms with section 18(b)(3) and other Shipping Act requirements illustrate my view that no such rule should be accepted as a complete bar to reparation. The problems would be obviated by adhering to my views expressed in the *Kraft* case.

[7] *Royal Netherlands SS Co. v. FMB*, 304 F.2d 938 (1962), *OFC v. Royal Netherlands S.S. Co.*, Adoption of Initial Decision, 14 SRR 139, 141 (1973).

Act taken together with section 18(b)(3) of the Shipping Act clearly evince a congressional intent to weigh the balance evenly between the shipper and the carrier and not so heavily in favor of the carrier as the majority proposes to do here.

Consequently, based upon my views set forth in *Kraft* [8] which I incorporate herein by reference, I concur in the grant of reparation. For the same reasons I dissent from the grounds stated by Chairman Bentley and Commissioner Day, from their anticipated enforcement of the form of tariff rule they suggest, and from the conclusions reached by Commissioners Barrett and Morse.

Commissioners Ashton C. Barrett and Clarence Morse, dissenting.

We would deny reparations.

After many months of consideration, the Commission, by vote of Chairman Bentley, Vice Chairman Day, Commissioners Barrett and Morse, Commissioner Hearn dissenting, issued its decision in *Kraft, supra,* and just recently denied a petition for reconsideration.

The basic and controlling principle enunciated in *Kraft* is set forth in the following excerpt [14 SRR 603 at 606]:

> Section 18(b)(3) makes it abundantly clear that a carrier is strictly bound to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves. [Footnote omitted.] Likewise, unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916, they must be strictly applied by us.

"Appropriate proceeding" means, here, proper notice and opportunity for hearing re lawfulness of tariff trade-name rule. 5 U.S.C. 551 et seq.

Under *Kraft,* the *first* issue to be resolved here is the question whether Tariff Item 2(h) which provides:

> Bills of Lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions appearing herein. Bills of Lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S. as minimum.

is or is not lawful under the standards of the Shipping Act, 1916. It is only in the event that we should find Tariff Item 2(h) unlawful, which we do not so find, would we ever reach the *second* question in these reparation cases, which question is whether the shipper has sustained its burden of proof in its contention that the shipment was misrated

[8] 14 SRR 603, 606.

by the carrier.[9] We adhere to the principles of *Kraft* and its application to Tariff Item 2(h).

Chairman Bentley and Vice Chairman Day assert that the trade-name rule, Tariff Item 2(h), establishes a flexible standard and presents an "opportunity for discrimination between shippers and as such cannot be relied upon by a carrier" and conclude the tariff rule is unlawful. We disagree.

We contend that a reasonable and realistic reading of Tariff Item 2(h) establishes a rate rule which leaves no room for qualification or discretion. Tariff Item 2(h) declares that if there is a tariff commodity rate applicable to a shipment described by the shipper by trade name, and which rate is *higher* than the Cargo, N.O.S. rate, then that higher commodity rate must apply—not the lower Cargo, N.O.S. rate.[10] In another situation in which a shipper describes the shipment by trade name, the Cargo, N.O.S. rate applies even where, as in *this* case, the tariff contains a *lower* commodity rate which would have applied had the shipment been described by commodity rather than trade name. In either situation there is and can be but one lawful rate applicable. These applications of rates are mandated by Tariff Item 2(h) when it uses the words "will be" and "automatically". This language leaves the carrier's rating clerk no room for discretion or flexibility. This is not to say that a rating clerk may not make a mistake—i.e., misrate a given shipment—but the possibility of that human error exists no matter how artfully worded a tariff rule may be.

On the present record we find and hold that Tariff Item 2(h) is a reasonable and lawful effort by the carrier and conference to ensure that all shippers be treated alike; the rule requires that all shippers declare to the carrier the true nature of the shipment in order that the shipment be properly rated by tariff commodity descriptions, rather than declaring the shipment by a trade name, in which latter event the carrier would not be advised of the true nature of the shipment and therefore might not be able to provide like treatment to different shippers. To assure that the true description of the shipment is given, Tariff Item 2(h), in the usual situation, imposes what in essence amounts to an added freight charge—the spread between the commodity rate and the usually higher Cargo N.O.S. rate—on the shipper who declares the shipment only by trade name. Tariff Item 2(h), inclusive of the phrase "as minimum" assures *absence* of discrimination. If the phrase "as minimum" is omit-

[9]Commissioner Hearn appears to classify the trade-name rule as falling within the principles applicable to errors in description and misclassification. In this he errs, for the tariff trade-name rule is but an extension of *Kraft* rather than a dispute as to proper rating of a shipment in which latter situation the burden of proof is critical.

[10]The term "commodity rate" is used only as an example. The appropriate applicable rate, whether specific, generic, or class, would be applied by the carrier.

ted, a loophole is left open which could result in discrimination.

There are only three conceivable factual possibilities in the trade-name situation: One, the Cargo, N.O.S. rate *exceeds* the commodity rate; Two, the Cargo, N.O.S. rate is *less* than the commodity rate; and Three, the Cargo, N.O.S. rate and the commodity rate *coincide*. The third possibility, coincidence of rate, cannot conceivably raise a problem in the area in which we are now concerned and will not be discussed further.

Accordingly, the problem can best be explained by giving two examples (in each instance the shipment being described only by trade name); the *first* example being a situation where the tariff commodity rate is *less* than the Cargo, N.O.S. rate; and the second example being a situation where the tariff commodity rate is *greater* than the Cargo, N.O.S. rate.

First example. Assume the commodity rate is $50 and the Cargo, N.O.S. rate is $60. Under Tariff Item 2(h), *supra*, if the shipper declares the shipment by trade name he is *"automatically"* assessed the $60 rate, no more (because here there is no applicable commodity rate in excess of the Cargo, N.O.S. rate) and no less (because of the mandate "as minimum" of Tariff Item 2(h)). If Tariff Item 2(h) provided precisely as it now provides except that the phrase "as minimum" were omitted—and this would be a trade-name rule to which Chairman Bentley and Vice Chairman Day state:

> We hasten to add, however, that we confess sympathy for a carrier faced with rating a cargo described only by trade name. His position is as defenseless as was the carrier's position in *Kraft Foods*. That being so, we note that in the future, we are inclined to look more favorably upon a defense such as that proposed here *provided* the rule sought to be relied upon is, in fact, a rule. Should such a rule mandate the application of the Cargo, N.O.S. rate to cargo described by trade name, not "as minimum" but as the only rate applicable, we would be more favorable to sustaining reliance on that rule.

—then, in applying that abbreviated rule one can reach but one answer, namely, that in this first example situation the carrier "automatically" would have to assess the Cargo, N.O.S. rate. Therefore, it is obvious that merely declaring the "as minimum" portion to be illegal will not help claimant—one would have to declare the *entire* trade-name rule unlawful (i.e., have *no* trade-name rule at all) in order to support an order herein in favor of claimant. Even if we followed the Bentley/Day philosophy (which we do not), we (and from the quotation, *supra*, seemingly, they) would not be justified in holding unlawful Tariff Item 2(h) absent "as minimum", and, again, applying such an abbreviated Tariff Item, reparations herein would be denied.

Second example. Assume, however, the situation where the Cargo, N.O.S. rate is *less* than the commodity rate. For example, the Cargo,

N.O.S. rate is $75 and the commodity rate is $100. In this factual situation but with a Tariff Item 2(h) which has the phrase "as minimum" *omitted*, the rating clerk will apply the Cargo, N.O.S. rate initially (initially, for he may have no information before him justifying application of a commodity rate and because of the mandate in Tariff Item 2(h) to "automatically" assess the Cargo, N.O.S. rate of $75), and even when the carrier ascertains the true nature of the shipment, the carrier nevertheless must *continue* to apply the $75 Cargo, N.O.S. rate rather than the $100 rate, for the tariff rule (absent "as minimum") mandates that in such situation the Cargo, N.O.S. rate, and only that rate, "automatically" applies.[11] This is a loophole which could be seized upon by the unscrupulous shipper and would result in discrimination in favor of such a shipper who would be assessed a $75 rate (absent "as minimum") and against the honest shipper who would give the proper tariff commodity description of the shipment and pay the $100 rate. If, however, the Tariff Item 2(h) *includes* the phrase "as minimum", then when a shipment is declared by trade name, it is rated at $75 in the first instance, for want of more complete description, but when the true nature of the shipment becomes known to the carrier the shipment must be rated according to its correct commodity rate of $100. With the phrase "as minimum" *included*, the carrier has no choice or flexibility if it abides by its filed tariff, for general principles of tariff construction *obligate* the application of a specific commodity rate, if one exists, in preference to and to the exclusion of the application of a Cargo, N.O.S. rate. Thus, it is clear that the "as minimum" phrase does not grant an "opportunity for discrimination". On the contrary, its presence closes a loophole which would otherwise exist permitting discrimination if the "as minimum" is deleted from the rule.

Having found Tariff Item 2(h) to be lawful, the shipment having been declared to the carrier by trade name only, the commodity rate being lower than the Cargo, N.O.S. rate, and the Cargo, N.O.S. rate having been assessed by the carrier, as mandated by Tariff Item 2(h), that concludes the matter.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[11] From the various common carrier tariffs on file in this agency we take official notice that it is not uncommon to see a carrier or a conference publish commodity rates at a level higher than its published Cargo, N.O.S. rates. This may occur, for example, in respect to rates covering chemicals, fresh produce, refrigerated cargo, and other merchandise where special handling, refrigeration, or hazard may be involved.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

The ILWU-PMA Nonmember Participation Agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union is subject to the jurisdiction of the Federal Maritime Commission under section 15 of the Shipping Act, 1916.

The ILWU-PMA Nonmember Participation Agreement is not "labor exempt".

Thomas J. White, Norman E. Sutherland, Alex L. Parks, Manley B. Strayer, Cleveland C. Cory, and *Gary R. Bullard* for Petitioner Ports.

Edward D. Ransom and *Robert Fremlin* for Pacific Maritime Association.

Norman Leonard for International Longshoremen's and Warehousemen's Union.

Thomas N. Gleason for International Longshoremen's Association.

Gerald Grinstein, Michael P. Crutcher, Louis F. Nawrot, Jr., Robert A. Koelker, and *Richard F. Ford* for Port of Seattle.

Francis Scanlan and *C. P. Lambos* for North Atlantic Shipping Association.

Paul J. Kaller and *Donald J. Brunner* as Hearing Counsel.

REPORT

Decided Jan. 27, 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett and George H. Hearn, *Commissioners*)

Background

This proceeding was instituted to determine whether a master collective bargaining contract and a Supplemental Memorandum of Un-

derstanding No. 4 (SMU 4), entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU), embody any agreements between and among the members of PMA which are subject to the requirements of section 15 of the Shipping Act, 1916 (the Act); whether the implementation of these contracts by the PMA and the ILWU would result in any practices which are violative of sections 16 and 17 of the Act; and finally, whether there are any labor policy considerations which would operate to exempt such agreements or practices from any provision of the aforementioned sections of the Shipping Act, 1916.

The Commission's investigation was initiated at the request of the petitioner ports,[1] who maintain that the subject agreements, providing for the employment of longshore labor, are "agreements" within the meaning of section 15 of the Act, which should have been filed for Commission approval pursuant to that section.

On October 19, 1972, the Commission issued its First Supplemental Order Severing Jurisdictional Issues. In that Order, the Commission decided to determine separately the matter of its jurisdiction under section 15 over the subject agreements. Additionally, the Commission advised therein that it would consider whether any labor considerations would operate to exempt those agreements or the practices resulting therefrom from the provisions of sections 15, 16, and 17 of the Act.

Thereafter, petitioner ports submitted a revised version of the SMU 4, entitled "ILWU-PMA Nonmember Participation Agreement", which was made part of the collective bargaining agreement under consideration in this proceeding. In its Second Supplemental Order Consolidating Jurisdictional Issues, served January 30, 1974, the Commission found that the "ILWU-PMA Nonmember Participation Agreement",[2] was the same in all its substantive essentials as the SMU 4, ". . . the only difference between the two being that the revised agreement was embodied in the master collective bargaining agreement between the PMA and ILWU."[3] The Commission proposed,

[1]The Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma.

[2]For the sake of convenience we will refer to the ILWU-PMA Nonmember Participation Agreement as the Revised Agreement. The Revised Agreement, like its predecessor SMU 4, requires that: (1) nonmembers join the PMA for an indefinite period as a condition to the direct employment of any member of the joint PMA-ILWU work force; (2) any separate contract with ILWU conform to the provisions of the Revised Agreement and the Pacific Coast Longshore and Clerks Agreement; (3) nonmembers employ members of the joint work force only through PMA allocation procedures and the ILWU-PMA dispatching halls; (4) nonmembers pay dues and assessments and accept proportional liability as to obligations of the PMA; and (5) nonmembers adhere to PMA decisions as to work stoppages, strikes and lockouts.

[3]PMA takes issue with the Commission's statement that "the only difference" between SMU 4 and the Revised Agreement is that the latter "is embodied in the master collective bargaining agreement". PMA believes that this language may create the false impression that "there was some difference in treatment of the nonmember participation agreement in 1973 by PMA and ILWU in order to avoid FMC jurisdiction over the agreement." PMA, in order "to dispel any notion" which may arise from the Commission's statement, point out that while the Revised Agreement

therefore, to (1) grant the supplemental petition of the petitioner ports, and (2) include the "ILWU-PMA Nonmember Participation Agreement" in the current deliberations rising out of the First Supplemental Order. In order to accord every possible due process, parties were afforded an additional opportunity to address themselves to these actions by the Commission. The comments submitted in response thereto have been fully considered by the Commission and found, for reasons stated below, not to dissuade us from our earlier views.

Before addressing ourselves to the jurisdictional question at issue here, we should first like to dispose of a preliminary matter raised by Hearing Counsel. Hearing Counsel have suggested that because the master collective bargaining agreement, including the Revised Agreement, "involve antitrust and related labor policies" and require a determination of whether parties engaged in collective bargaining have exceeded the scope of legitimate bargaining, the Commission should defer jurisdiction to either the NLRB or the courts and await their decision. If the agreements are found lawful, Hearing Counsel would then have the Commission examine the implementation of the agreements in the light of sections 16 and 17 of the Act.

As we noted in *New York Shipping Association—NYSA-ILA Man-Hour/Tonnage Method of Assessment; Possible Violation of Sections 15, 16 and 17, Shipping Act, 1916*, 16 F.M.C. 381, 397–398 (1973), the matter of deferring the legality of a bargaining agreement to the exclusive primary jurisdiction of the NLRB was presented to, and disposed of by, the Supreme Court in *Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676 (1965). In *Jewel Tea*, it was alleged that the union and other retail stores had conspired to prevent the retail sale of meat before 9:00 A.M. and after 6:00 P.M. The prohibition was contained in a collective bargaining agreement, and the question of the "labor exemption" from the antitrust laws was presented. The union attacked the appropriateness of the District Court's jurisdiction on the ground that the controversy was within the exclusive primary jurisdiction of the NLRB. The Supreme Court rejected this contention on the

was physically incorporated into the 1973 master collective bargaining agreement whereas SMU 4 was simply made a supplement to the 1972 master collective bargaining agreement, the agreements are not at all unlike since both form part of their respective master collective bargaining agreements.

While we do not share PMA's concern that the challenged language in our Second Supplemental Order may create misleading impressions, in order to allay PMA's fear and to avoid any further misinterpretation, we wish to state on the record that we have never doubted that either SMU 4 or the Revised Agreement was part of the master collective bargaining agreement in effect at the time, nor was it our intention to question the parties' motives in treating the two agreements differently. In fact, however, PMA's apprehension is nonconsequential since either method of incorporation has the same effect. It is the substance, and not a change in form, of the agreement with its corresponding impact upon employers in the industry that concerns the Commission.

ground that the NLRB jurisdiction was primarily restricted to the policing of the collective bargaining process and was not concerned with the substantive merits of the agreement once it was signed. As it was in the *New York Shipping* case, this holding is dispositive of the suggestion made here that we defer jurisdiction over the Revised Agreement to the NLRB.

Before us is a complaint that alleges not that the parties have refused to bargain, but rather that they have entered into an agreement in violation of the shipping and antitrust laws. As a result, the NLRB is without "available procedure" to investigate the legality of the "ILWU-PMA Nonmember Participation Agreement".[4] This Commission, however, has been vested with authority over the approvability of this agreement and the exercise of such authority is consistent with the principle of primary jurisdiction as acknowledged by the Court in the *Jewel Tea* case that preliminary resort should be had to the agency which administers the statutory scheme in order to protect the integrity of that scheme. See *Port of Boston Marine Terminal Assn., et al. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970).

Hearing Counsel's alternate suggestion that the Commission defer the present matter to the courts is equally without merit. Since the Commission has already intervened in the counterpart District Court case and requested that court to stay its proceeding therein, which it has done, until the Commission has had an opportunity to pass upon the status of pertinent agreements under the Shipping Act, it would be both inconsistent and counterproductive for us to now ask that the matter be litigated before the court. More importantly, we believe that consideration of the Revised Agreement in light of the requirements of the Shipping Act is a legitimate concern of this Commission and one that is properly before us. The Commission simply cannot defer to the courts matters which are so intricately involved with its responsibilities under the shipping statutes. As we said in *United Stevedore Corp. v. Boston Shipping Association,* 16 F.M.C. 7 (1972), when establishing the applicable criteria, a labor-related agreement:

> . . . must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

[4]See discussion of Supreme Court on this point in *Meat Cutters Union v. Jewel Tea Co., supra,* at page 687.

Accordingly, we believe that under the circumstances this would be an inappropriate case for the Commission to withhold its determination out of deference to the "expertise" of either the NLRB or the courts. With this in mind, we proceed with a discussion of the jurisdictional issues involved.

Initially, Respondent PMA and Intervenors ILWU and CONASA [5] raised the same objections to the Commission's jurisdiction over the parties to the master collective bargaining agreement as were advanced by NYSA in *New York Shipping, supra.* Specifically, these parties contend that: (1) since PMA is an association with some members who are not "common carriers" or "other persons subject to this Act", and (2) since one of the parties to the collective bargaining agreement is a labor union, the Commission has no jurisdiction over the agreement.

These arguments were not only laid to rest by this Commission in our decision in the *New York Shipping* case, *supra,* but also rejected by the court in *NYSA and ILA v. FMC,* 495 F.2d 1215 (2nd Cir. April 8, 1974), cert. denied. ___ U.S. ___ (October 29, 1974). In supporting the Commission's jurisdiction over a multiemployer bargaining association and the agreement entered into among its members, the court there stated:

> We find the merits considerably less difficult than the issue of reviewability; indeed, given the decision in *Volkswagenwerk* [390 U.S. 261 (1968)], we see no need for making such heavy weather on the subject as the Commission did. [Footnote omitted.]
>
> The assessment agreement fits the definition of §15 since it imposes obligations on common carriers by water and other persons subject to the Shipping Act, to wit, terminal operators, see 49 U.S.C. §801. An agreement to which such persons are parties is not taken out of §15 by the fact that persons not fitting that definition, to wit, stevedoring contractors who are not terminal operators, are also bound. *Volkswagenwerk* established that an agreement among water carriers, stevedoring contractors and terminal operators allocating assessments for benefits negotiated with a longshoremen's union requires approval under §15. The FMC took jurisdiction of T-2390, the predecessor of the present assessment formula, apparently without objection, and directed certain modifications; its action has been sustained, without any suggestion that the FMC lacked jurisdiction over the agreement, in a comprehensive opinion by the District of Columbia Circuit, *Transamerican Trailer Transport, Inc. v. FMC, supra.* The petitioners urge that the present case is distinguishable on the basis that the agreements in *Volkswagenwerk* and *Transamerican Trailer Transport* were solely among stevedoring contractors, terminal operators and carriers, while the ILA took an active part in negotiating and is a party to the agreement here at issue. This is a distinction without a difference. To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable assessment formula, this does

[5] For the sake of convenience, PMA, the ILWU and the Council of North Atlantic Shipping Associations (CONASA) will hereinafter be collectively referred to as "Respondents".

not relieve the FMC of its duty to determine whether the formula is reasonable in its effects on shipping. That inquiry is just as important as under the predecessor agreement and under the agreement in *Volkswagenwerk.* (Id., pages 27, 35–36)

Further, we find that the Revised Agreement before us is factually substantially similar to the assessment agreement which the Supreme Court found subject to section 15 in *Volkswagenwerk v. FMC, supra.* Consider the parallels. In *Volkswagen:* (1) the ILWU and the PMA had laboriously negotiated on the establishment of the Mech Fund, which, in part, liberalized the union's fringe benefit program, (2) the only interest of the ILWU was to insure that payments were made into the fund, and (3) the PMA wanted to reserve to itself how the payments were computed and the ILWU left that to PMA. Here, (1) PMA and the ILWU have stated on the record that they have over a period of years negotiated a program of fringe benefits and that this program was supported by the payments of both members and nonmembers of the PMA, (2) the only interest of the ILWU is allegedly to assure that all industry users of ILWU labor made payments into the fringe benefit fund, and (3) PMA wants to reserve to itself all control of industry users of labor.

In spite of these obvious similarities, Respondents here contend that the rationale of the *Volkswagen* case is inapplicable here because the assessment agreement under consideration in *Volkswagen* was exclusively concerned with "the relationship between association members and their customers", while SMU 4 and its successor, the Revised Agreement, involve matters of fundamental concern to the union and its members.[6]

Whatever be the merits of this argument, PMA itself readily admits that the purpose of the supplemental agreements is to do away with the "free ride" previously enjoyed by Petitioners and other similarly situated ports and to place nonmembers on the same "competitive" basis as members of the PMA. In short, the effect of the Revised Agreement is to control or affect competition between members and nonmembers.[7] Section 15 of the Shipping Act specifically subjects to Commission jurisdiction all agreements between persons subject to the Act which control, regulate or prevent competition.[8] Thus, we conclude that the Revised Agreement must be filed for Commission approval unless it is entitled to a "labor

[6]Petitioners, however, continually allude to the lack of any "legitimate" interest of the ILWU in the PMA's attempt to control the "competition between members and nonmembers".

[7]In response to our Second Supplemental Order, all the parties to this proceeding have incorporated by reference their remarks concerning SMU 4 and have asked the Commission to apply them equally to the Revised Agreement. Consequently, we have substituted the term "Revised Agreement" wherever an argument was used with reference to SMU 4.

[8]PMA, for example, would bind nonmembers to PMA "lockouts", thus preventing a nonmember from continuing operations while members' facilities are shut down.

exemption".[9] For reasons stated below, we find that the Revised Agreement is not entitled to such an exemption.

The nature and scope of the so-called "labor exemption" from the antitrust and shipping laws have been considered and discussed at considerable length by the Commission in its decision in *Boston Shipping, supra.* In that case the Commission, in reviewing three labor-related agreements, applied doctrines of law which had evolved through the courts in a number of cases arising under the antitrust laws. Recognizing the judicially-accepted principle that the fruits of collective bargaining are generally excepted from the application of the antitrust statutes, the Commission explained therein that:

> The "labor exemption" originated in the area of accommodation of the labor laws and the antitrust laws. To preclude the application of the antitrust laws to various collective bargaining agreements entered into between labor and management, the courts carved out of the antitrust laws a "labor exemption", by means of which such agreements were held to be immune from attack under antitrust laws. Thus, the analogy to a "labor exemption" from the shipping laws is obvious. (16 F.M.C. 11)

In determining whether labor-related agreements are subject to the provisions of the Shipping Act, 1916, or "labor exempt", the Commission has advised that just as in the courts' accommodation of the labor laws and the antitrust laws, it would proceed on an ad hoc case-by-case basis and apply "the various criteria" evolved in the courts as guidelines or "rules of thumb" for each factual situation. As detailed in the *Boston Shipping* case, these criteria are as follows:

> 1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball".
>
> 2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.
>
> 3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.
>
> 4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management.

[9] Seattle has presently petitioned for severance and stay from this proceeding all issues relating to the master collective bargaining contract except for the Revised Agreement. Because the Revised Agreement is different in operation from the remaining sections of the collective bargaining contract, Seattle maintains that the latter is immaterial to the Commission's concern, especially since it raises issues already decided by the NLRB. (See *ILWU, et al., and California Cartage Company, et al.*, 208 NLRB No. 124 (February 15, 1974), wherein the NLRB found a substantial portion of the master collective bargaining contract unlawful.) As heretofore mentioned, because there are involved in the National Labor Relations Act and the Shipping Act, 1916 (the Act) two different purposes, it would not necessarily follow that a holding under NLRB concepts would be equally applicable to our responsibilities under the Act. Consequently, while we can agree with Seattle that the Revised Agreement within the collective bargaining contract is the *only* agreement among and between members of PMA having section 15 ramifications, there still remains the question of the legality of the agreements among and between members of PMA under sections 16 and 17 of the Act. For this reason, we are denying Seattle's petition. For purposes of this interlocutory proceeding, however, we are hereinafter limiting our discussion solely to the Revised Agreement.

Failure of an agreement to meet any one of these criteria is sufficient to consider withholding a labor exemption. As we explained in the *Boston Shipping* case, "[t]hese criteria are by no means meant to be exclusive nor are they determinative in each and every case." (16 F.M.C. 12)

There is considerable factual conflict among the affidavits from officials of various organizations and purported "notes" taken at PMA meetings as to whether the Revised Agreement was the simple product of, as PMA asserts, "eyeball to eyeball" good faith bargaining or, as contended by Petitioners, was insisted upon by PMA "as a part of its longrange program to force all persons and entities utilizing longshore labor to join PMA as a member and to subscribe to and follow PMA's labor policies." Whatever be the merits of the parties' arguments, we need reach no conclusions on this issue since our finding that the Revised Agreement is not entitled to a labor exemption rests entirely on other grounds.

As to the second criteria, sections 8(a)(5) and 8(d) of the National Labor Relations Act (49 Stat. 452) define the "mandatory" issues of collective bargaining as "wages, hours, and other terms and conditions of employment". Although the National Labor Relations Act does not define what constitutes "terms and conditions of employment", other than wages and hours, the NLRB, with the approval of the courts, has initiated a system of classification by dividing subjects of bargaining into three categories: mandatory, permissive and illegal. Whether or not a subject of bargaining is mandatory or permissive depends upon the extent to which the agreement addresses itself to the labor relations of the contract employer, vis-a-vis his own employees.[10] Obviously, while union and management may bargain on mandatory and other issues, this does not necessarily mean that any agreement concluded will not violate the antitrust laws and/or the Shipping Act.

Petitioners submit that at best the subject of the Revised Agreement is permissive only. In support thereof, Petitioners advance a three-prong argument, the substance of which alleges that the ILWU gained nothing that it did not already have by the terms of the overall PCLCA.[11] Petitioners first contend that, notwithstanding the Revised Agreement, nonmembers would continue to contribute to the fringe benefit programs in the same amounts as PMA members and signified their willingness to continue to do so. Secondly, they maintain that while the Revised Agreement resolved the "problem" of "steady

[10]See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1968); *Nat'l Woodwork Manufacturing Assoc. v. NLRB*, 386 U.S. 612 (1967).

[11]PCLCA (Pacific Coast Longshore & Clerk Agreement), which established the PMA-ILWU joint work force in 1935, is the basic collective bargaining agreement which has been amended to include a Memorandum of Understanding in which the Revised Agreement is a part thereof.

men" by requiring uniformity with PCLCA's provisions, this was in actuality PMA's problem and not that of the ILWU, who allegedly had no interest therein. Finally, Petitioners argue that the requirement that participating nonmembers would pay dues and assessments into PMA to support labor relations programs and would adhere to PMA labor policies had no relationship to "hours, wages, or working conditions".[12]

Thus, Petitioners' position here is that the issue here does not involve altering or modifying the wages, hours or working conditions of the ILWU—areas which would understandably be of primary concern to the union—but rather involves the matter of what a nonmember must agree to as a condition to directly employing ILWU labor.

Respondents argue that contrary to the belief of Petitioners, the Revised Agreement relates directly to a mandatory subject of bargaining. Moreover, Respondents point out that there has been a long bargaining history of nonmember participation in both the PMA-ILWU hiring hall and fringe benefit systems.[13]

The Revised Agreement, insofar as it changes the treatment of "steady men" and requires all direct hiring to be in accordance with PMA procedures, obviously affects hours or working conditions. The question is, however, whether the agreement is directed to the labor relations of the contracting employer, vis-a-vis his own employees. We think not. Since the primary purpose of the Revised Agreement is to bring nonmembers into the PMA "camp", that it affects the hours or working conditions of some of the members of the ILWU would appear to be only incidental to the main purpose of the agreement. Thus, we can only conclude that the matter of the Revised Agreement is not a mandatory subject of bargaining. While this finding may be sufficient to consider withholding a "labor exemption", our ultimate conclusion that the Revised Agreement is *not* entitled to a labor exemption rests on additional grounds.

Respondents have devoted much argument in their memorandum to support their contention that the Revised Agreement does not, as Petitioners have insisted, impose such terms upon persons or entities outside the bargaining group as would justify the denial of a labor exemption. In fact, Respondents, in furtherance of their argument that there are "a number of significant differences" between SMU 4 and the Revised Agreement, advise that one of the "changes" incorpo-

[12]This conclusion is primarily founded upon the remarks of Mr. Flynn, President of PMA, to wit:
A nonmember share is measured by all the obligations included in the nonmember participation agreement, not just a monetary contribution (p. 9 of Mr. Flynn's affidavit).

[13]See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964), wherein the Court held that in determining whether or not a matter is a mandatory subject of bargaining, it is appropriate to consider bargaining history.

rated in the Revised Agreement was intended to allay any fears on the part of Petitioners that the Agreement imposed terms on outsiders. Notwithstanding such assurances and for reasons stated below, we agree with Hearing Counsel and Petitioners that the Agreement is specifically designed to compel nonmember entities to join PMA under threat of exclusion from the ILWU work force. As such it clearly imposes terms and conditions upon persons outside the bargaining group.

To "remove any doubt" that the agreement between PMA and ILWU restricted the latter in its bargaining with nonmembers, Respondents explain that the note after Paragraph 3(b) of SMU 4 was deleted from the Revised Agreement. This note provided that:

> If a prospective nonmember participant has an agreement with the ILWU which provides for utilization of the joint work force at terms and conditions of employment more favorable to the nonmember than those provided under the PCLCA, including the CFSS [Container Freight Station Supplement], such nonmember must alter the agreement to conform to the PCLCA, including the CFSS, in order to become a nonmember participant.

Seattle and Petitioners view this deletion as being cosmetic only and in no way altering the effects of the agreement. In support of its position that PMA is still utilizing the joint work force as a means of controlling the labor policies of nonmember ports, specific reliance is placed on Paragraphs 2, 3, 6 and 12 of the Revised Agreement, to wit:

> 2. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.
>
> 3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA,
>
> b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,
>
> c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.
>
> The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants.
>
> 6. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so using the joint work force.
>
> 12. the ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect until terminated on such terms and conditions as may be mutually agreed to by the PMA, the ILWU and the participant. An entity that terminates its participation

shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare, Vacation and Pay Guarantee Plans existing between ILWU and PMA.

Consequently, while nonmembers are allowed to negotiate separate contracts, the contracts must, nevertheless, conform with the provisions of both the Revised Agreement and the master collective bargaining contract (Paragraph 2). Moreover, and notwithstanding the further deletion by PMA of Paragraph 9 of SMU 4 from the Revised Agreement,[14] Paragraph 3 of the Revised Agreement still requires, in effect, that nonmembers adhere to PMA labor policies pursuant to a work stoppage by ILWU.

Additionally, Paragraph 6, by providing that if nonmembers use the ILWU work force on terms more favorable than to PMA members, the nonmembers will be deprived use of the PMA-ILWU joint work force, appears to allow for the imposition of work rules on nonmembers.[15]

As a further indication that PMA is still controlling labor policies of nonmembers, we note that the substance of the termination provision of Paragraph 12 of the Revised Agreement is akin to that of Paragraph 13 of SMU 4. Whereas Paragraph 13 provided that a contract could only be terminated by the joint action of PMA and ILWU, Paragraph 12 requires that the nonmember be included as part of this joint action. In effect, therefore, under either paragraph, the nonmember is still bound to the agreement for an indefinite period of time since the nonmember cannot unilaterally terminate the agreement but can only do so upon such "terms and conditions" as may be "mutually" agreed to by PMA and ILWU.

The foregoing, we believe, makes it clear that no substantial differences exist between the old SMU 4 and the Revised Agreement. Whatever revisions were made in the Revised Agreement are changes in form only which in no way substantially alter the effect or impact of the agreement. The effect of the Revised Agreement, we find, is to require entities outside the bargaining group to either submit to its terms or incur the sanctions contained therein, i.e. deny nonmembers participation in PMA hiring halls and fringe benefit funds as well as the use of ILWU labor. In this regard, we agree with Hearing Counsel that the agreements at issue here "bear a striking resemblance" to that found unlawful under the antitrust laws in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

In the *Pennington* case, a group of large employers in the mining

[14]Paragraph 9 of SMU 4 provided that if there were a cessation of work at the end of the contract period of the PCLCA and related agreements, the labor policy of PMA shall continue to apply to nonmember participants, and that nonmember participants shall continue to accept PMA's labor policy as their own.

[15]Paragraph 6 of the Revised Agreement is identical in intent to Paragraph 3(b) of SMU 4.

industry had agreed with the union to impose its wage and royalty scale on smaller nonunion operators outside the immediate bargaining group. Plaintiff there contended that this scheme was intended to eliminate from competition the smaller mine operators who allegedly could not withstand the costs of the particular terms and conditions of employment which would be forced upon them. The Court concluded that while a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers, it:

> . . . forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry. (381 U.S. at pages 665–66.)

We believe that the Court's rationale in *Pennington*, which is clearly not limited to the imposition of a wage scale but could involve any other labor standard, such as labor relations policy, is applicable to the agreements before us. Instead of a system of computing wages, which because of difference in methods of production would be more costly to one set of employers than another, the PMA and ILWU here have devised a scheme whereby the elimination of all local agreements between nonmembers and the ILWU would result in higher costs to one set of employers (the nonmembers) than to another (PMA members); particularly, since the differences in methods of operation and locality are ignored.[16]

Respondents read *Pennington* as establishing only the principle that a union may not by agreement with one employer restrict its right to bargain with other employers. Such a reading of *Pennington* is far too restrictive and totally ignores the real issue in the case, i.e., the *imposition* of terms on persons outside the bargaining group. The fact that the scheme employed in *Pennington* required the UMW to surrender its freedom of action is only incidental to the Court's ultimate holding that a union and employers in one bargaining unit "are not free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry". (381 U.S. at 666.)

[16]Petitioners cite as an example the Port of Olympia. Under its agreement with Local No. 47 in the Olympia area, the local provides, among others, checkers. If the Port were required to abrogate its local agreement and adhere to the requirements of the Coast Agreement, members of the ILWU Checkers' Union in Seattle would have to be employed, thus increasing the cost to the Port of Olympia by the amount of payments for travel time to and from Seattle. The same situation prevails at the Port of Port Angeles. This shift in costs directly affects the Ports' costs of providing terminal services and thereby the rates paid by the shipping public.

Even assuming that Respondents' interpretation of *Pennington* is correct, the Revised Agreement is still clearly inconsistent therewith, as clearly indicated by Paragraphs 2, 3, 6 and 12 of the aforementioned agreement, delineated earlier. Under Respondents' own interpretation of *Pennington*, the Revised Agreement restricts nonmembers' right to bargain and thereby imposes such terms upon entities outside the collective bargaining unit as to preclude the granting of a "labor exemption".

Addressing themselves to the fourth "labor exemption" criterion, Petitioners challenge PMA's contention that "no conspiracy" existed between PMA and ILWU. PMA argues that there is nothing in the Revised Agreement that precludes the ILWU from making whatever arrangements it and the nonmembers can negotiate. Seattle, on the other hand, refers to the ILWU's chief negotiator's remarks during negotiations over SMU 4 that the ILWU would cooperate with PMA and provide PMA with "insurance" against "legal entanglements" if PMA would be cooperative in other areas. In view of our finding here that the Revised Agreement is not entitled to a labor exemption by virtue of the fact that it imposes terms on parties outside the bargaining unit and is not a subject of mandatory bargaining, we find it unnecessary to resolve the merits of the "conspiracy" issue.

In the "final analysis", our assertion of jurisdiction over a labor-related agreement requires, as we noted in *Boston Shipping*, a consideration of the impact of such agreement on the competitive conditions in the industry, vis-a-vis its impact on the collective bargaining process. On this basis, and taking into consideration several past court decisions [17] involving labor-related agreements, we find that while the Revised Agreement has a minimal effect on the collective bargaining process, it has such a potentially severe and adverse effect upon competition under the Shipping Act as would justify our consideration of its approvability under the standards thereof. Without passing on the individual merits of each of their contentions, we believe that Petitioners have generally demonstrated the possible adverse impact of the Revised Agreement and the effect its implementation could have on their ability to compete with PMA members. As Petitioners have pointed out, their failure to sign the Revised Agreement could well result in the closing of their facilities and the cessation of operations because (1) they will be denied ILWU personnel from the joint hiring hall; (2) if they employ non-ILWU personnel, ILWU personnel utilized by PMA stevedoring companies to load and unload cargo to and from

[17] See *Allen Bradley Co. v. Local 3 International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945); *Meat Cutters Union v. Jewel Tea Co., supra; United Mine Workers v. Pennington, supra; Volkswagenwerk v. FMC, supra;* and *NYSA and ILA v. FMC, supra.*

ships will refuse to work the cargo; and (3) the ILWU would undoubtedly put up picket lines at the entrances of all ports' terminals, thus effectively stopping the movement of all cargo being delivered to or taken from such terminals by other union personnel.[18] It follows, therefore, that the implementation of the Revised Agreement, as it may affect the receiving, handling, storing and delivery of cargo at petitioner ports, may involve violations of sections 16 and 17 of the Shipping Act, 1916.

On the other hand, we find that the Revised Agreement has little if any effect on the collective bargaining process. With or without the Revised Agreement, the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged.

Further, if petitioner ports contracted with PMA stevedoring companies (employing ILWU personnel) to perform all the terminaling services now directly performed by the ports themselves, the ports would be precluded from any decision-making power with respect to the performance of services at their terminals. Consequently, as a practical matter, Petitioners would be delegating to such stevedoring companies all ratemaking decisions, and thus, being profit-motivated, these companies would have discretion and incentive to divert cargo from one port to another by simply granting different rates for each area.

Finally, we should like to point out that we do not view our exercise of jurisdiction over the Revised Agreement as interfering with the collective bargaining process within the maritime industry. Such an assertion of jurisdiction does not violate the right of employees to bargain collectively through representatives of their choice. Further, we disagree with Respondents that our jurisdiction over the Revised Agreement will preclude the remaining sections of the master collective bargaining agreement from being implemented. At issue here is only the Revised Agreement which we consider severable from other provisions of the master collective bargaining agreement, i.e. the amount and kind of fringe benefits to be paid the union. The obligation of PMA to pay those benefits remains unimpaired. Consequently, the Commission's assertion of jurisdiction will have no effect upon PMA's obligations under the labor contract.

Therefore, weighing the various Shipping Act and labor interests raised by the Revised Agreement, we conclude, consistent with the court's holding and directives in *NYSA and ILA v. FMC, supra,* that the many and potentially severe shipping problems raised by the

[18]Although conceding that longshoremen and clerks are available outside the PMA-ILWU joint work force, Petitioners submit that these types are not suitable for employment as they are unskilled labor; skilled labor can only be gotten from the ILWU work force.

Revised Agreement balanced against the minimal impact our regulation thereof would have on the collective bargaining process fully warrants our denial of a "labor exemption" in this proceeding. While the court in *NYSA and ILA v. FMC, supra,* concluded that on the basis of facts involved therein it was "enough" for the Commission to find that the shipping interests outweigh the labor interests in asserting jurisdiction over a labor-related agreement, we believe that our discussion of the Revised Agreement in light of the four "exemption" criteria, is not only responsive to the pleadings of the parties but also lends additional support to the conclusion reached here.

Commissioner Clarence Morse, dissenting.

I dissent.

We are in an area which involves not only the Shipping Act, 1916, but also the antitrust laws and the labor laws, and it becomes a matter of judgment and line drawing in determining whether we should retain jurisdiction [19] or whether we should grant labor exemption and leave the matter for resolution by the courts and the NLRB. Under our decision in *Boston Shipping,* 16 F.M.C. 7, it remains within our sound discretion whether to grant labor exemption even when an agreement fails to meet one or more of our announced criteria.[20] It is my view that the impact of the Revised Agreement vis-a-vis the collective bargaining process outweighs the impact of that agreement on the competitive conditions within the industry. In all events, the courts in the pending antitrust cases and the NLRB have far greater expertise in this antitrust and labor law area, and more flexible tools by way of treble damages, injunctive process, and otherwise, than do we to assure that the rights of all interested parties will be duly protected.[21]

[19] As to *subject matter,* the intra-PMA agreement concerning the ILWU-PMA Nonmember Participation Agreement is clearly a section 15 agreement. Whether such agreement meets section 15 standards as to *parties* is not established on this record and, with due respect to *NYSA & ILA* v. *FMC, supra,* I would have fundamental jurisdictional problems if, in fact, "mixed membership" exists within PMA. Under *Boston Shipping,* it would appear that PMA itself is primarily a collective bargaining unit and should receive labor exemption. However, that does not resolve the problem, for to find existence of a section 15 agreement between "common carriers by water" and "other persons subject to the Act" we must consider the membership of PMA, since the functions of PMA, a corporation, itself are neither that of a common carrier by water nor an "other person subject to the Act". ILWU is clearly neither of the described type of persons.

[20] In *United Stevedoring Corp.* v. *Boston Shipping Assoc.,* 16 F.M.C. 7 at 15 (August 24, 1972) we stated in part: "While we cannot here decide that every such collective bargaining agreement is entitled to a labor exemption, Hearing Counsel and the Department of Justice recommend the consideration of a section 35 rulemaking proceeding in order to exempt for the future this class of agreements from some or all of the requirements of section 15 of the Shipping Act, 1916, thereby not jeopardizing collective bargaining by any threat of pre-approval implementation penalty. This we intend to do." I again ask *WHEN* is this Commission proposing to initiate such a proceeding?

[21] In my opinion, the majority ignore the reality of labor-management relations when they suggest that denial of labor exemption to the Revised Agreement "will have no effect upon PMA's obligations under the labor contract." This is another indication of our lack of expertise in this labor-management field. An earlier example is the Court's reaction stated in its Opinion on Motion to Remand in *Boston Shipping Assoc.* v. *USA* (CA-1, No. 72-1004, May 31, 1972) when commenting on our earlier report in *United Stevedoring Corp.* v. *Boston Shipping Assoc.,* 15 F.M.C. 33 (1971).

I would grant labor exemption and stay our proceedings without prejudice pending resolution of the pending court cases, and if the involved agreements are found lawful by the courts and the parties carry out specific practices in a manner which may violate sections 16 or 17 of the Shipping Act, then Shipping Act concern may become substantial and the obligations of members of the PMA under the Shipping Act (and also the ILWU as "any other person" under section 16) may have to be determined by the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

ORDER

The Federal Maritime Commission instituted this proceeding to determine, *inter alia,* whether the master collective bargaining contract entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union embody any agreements between and among members of PMA, which agreements are subject to section 15 of the Shipping Act, 1916; and whether there were any labor policy considerations which would operate to exempt such agreements or practices from section 15 of the Shipping Act, 1916. The Commission having this date made and entered its report stating its findings and conclusions with respect thereto, which report is made a part hereof by reference:

Therefore, it is ordered, That pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821), and consistent with the Commission's Order of September 6, 1972, as amended by its Orders of October 19, 1972 and January 30, 1974, the investigation in this docket shall proceed to determine:

1. Whether the "ILWU-PMA Nonmember Participation Agreement" (Revised Agreement), which is embodied in the ILWU-PMA master collective bargaining contract and which we have found to be subject to and must be filed in accordance with the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), should be approved, disapproved, or modified pursuant to that section;

2. Whether the implementation by PMA and the ILWU of the provisions of the Revised Agreement and/or the master collective bargaining agreement will result in any practices which will subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916 (46 U.S.C. 815);

3. Whether the implementation by PMA and ILWU of the provisions of the Revised Agreement and/or the master collective bargaining agreement will result in any practice which is unjust or unreasonable in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. 816);

4. Whether any labor policy considerations would operate to exempt these agreements or practices resulting therefrom from any provision of sections 16 or 17 of the Shipping Act, 1916; and

It is further ordered, That the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, and their respective members are hereby made respondents in this proceeding; and

It is further ordered, That a public hearing be held before an Administrative Law Judge of the Commission's Office of Administrative Law Judges at a date and place to be determined and announced by the Administrative Law Judge; and

It is further ordered, That notice of this order be published in the *Federal Register* and that a copy thereof and notice of hearing be served upon Petitioners and both the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their respective members; and

It is further ordered, That notice of this order and notice of hearing be mailed directly to the Department of Justice, the Department of Labor and the National Labor Relations Board; and

It is further ordered, That all future notices issued by or on behalf of the Commission in this proceeding, including notice of time and place of hearing or prehearing conference, shall be mailed to Petitioners, the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their members, and any other person made a party of record to this proceeding; and

It is further ordered, That any person other than those named herein who desires to become a party to this proceeding and to participate herein, shall file a petition to intervene in accordance with Rule 5(l) (46 CFR §502.72) of the Commission's Rules of Practice and Procedure.

Finally, it is ordered, That Seattle's Petition for Severance hereby is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 73-46

PACIFIC ISLANDS TRANSPORT LINE—PROPOSED GENERAL RATE INCREASES BETWEEN PACIFIC COAST AND HAWAII PORTS OF CALL AND PAGO PAGO, AMERICAN SAMOA

NOTICE OF ADOPTION OF INITIAL DECISION

Jan 30 1975

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 30, 1975.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 73-46

PACIFIC ISLANDS TRANSPORT LINE—PROPOSED GENERAL RATE INCREASES BETWEEN PACIFIC COAST AND HAWAII PORTS OF CALL AND PAGO PAGO, AMERICAN SAMOA

Respondent Pacific Islands Transport Line found to have shown a need for additional revenue and to have sustained its burden of proving that its rate increases are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

In view of continued and expected losses by respondent and lack of substantial evidence on point, suggestions by parties representing American Samoa that the subject general rate increases should be modified by altering individual commodity rates or by changing the outbound/inbound rate levels cannot be implemented under applicable principles of law.

F. Conger Fawcett for respondent.

C. Brewster Champman, Jr., for complainant U. S. Department of the Interior and intervener Government of American Samoa.

George A. Wray for complainant American Samoa Chamber of Commerce.

Donald J. Brunner and *C. Douglass Miller*, Hearing Counsel.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was instituted by order of the Commission served August 3, 1973, to determine whether certain rate increases filed by respondent Pacific Islands Transport Line (PITL) are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The subject rate increases applied to cargo moving outbound from the U. S. Pacific Coast to American Samoa, with certain exceptions, in the amount of 23 percent and to cargo moving inbound from American Samoa in the amount of 12 percent. The rate changes were scheduled to become effective on June 15, 1973, but were postponed by PITL until August

[1] This decision became the decision of the Commission 1/30/75

13, 1973, in order to comply with the then current Presidential order freezing prices. The Commission, however, suspended the effective date until December 1, 1973.

Protests to the subject increases were filed by a number of parties representing American Samoan interests who were named as complainants in the Commission's Order. Only two protestants actively participated throughout the entire proceeding, namely, the Department of the Interior and the Government of American Samoa, both represented by the Assistant Solicitor, Territories, Department of the Interior. The American Samoa Chamber of Commerce appeared at the hearing represented by counsel and furnished a witness but ceased thereafter to respond to pertinent pleadings and rulings issued subsequent to the hearing and filed no brief.

Hearing was held in San Francisco, California, on April 2 and 3, 1974. In view of the unique nature of this case involving a foreign-flag carrier headquartered in Norway, provision was made for a post-hearing analysis of financial data by Hearing Counsel obtained through the cooperation of respondent from its overseas location and opportunity for presentation of further evidence was afforded if necessary. As discussed below, this necessity did not arise.[2]

General Description of the Trade, the Service, and the Line

PITL is a Norwegian-owned steamship operation, based in Sandefjord, Norway. It is owned by A/S Thor Dahl, which also operates vessels in other trades not connected with the United States of America. PITL is its only U.S.-connected service, which operates in the U.S. Pacific Coast/American Samoa trade by virtue of a special statutory exemption, as noted previously. General Steamship Corporation, Ltd. (GenSteam) acts as the Line's general agents responsible for soliciting and booking cargo and, in conjunction with the vessel's Master, for the day-to-day operations of the Line. Overall policy and planning, meanning and provisioning the vessel, executing bunker contracts and purchases (as opposed to merely arranging for the physical bunkering itself) and insurance are functions of the owner in Sandefjord.

[2]The unique status of this case relates to the fact that although regulated under section 18(a) of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, as regards the West Coast/American Samoan trade, PITL is a foreign-flag operator which by special statute is permitted to serve this "domestic offshore" trade, which would be otherwise restricted to vessels registered under the laws of the United States. See 48 U.S.C. 1664; 46 U.S.C. 883. In recognition of the peculiar difficulties arising out of this situation with regard to the filing of financial reports pursuant to the Commission's General Order 11, an accord has apparently been reached with the Commission's staff permitting certain modifications to the reports. In another proceeding in which it is proposed that General Order 11 be modified in a number of respects, it has been found by Administrative Law Judge Levy that foreign-flag carriers such as PITL operating in "domestic offshore" trades be exempt from the filing requirements altogether. See Docket No. 67-57, *Significant Vessel Operating Common Carriers in the Domestic Offshore Trades, Etc.*, Initial Decision, October 10, 1974, pp. 43-47.

PITL commenced serving the U. S. Pacific Coast/American Samoa trade on a regular basis in July of 1955. At that time the only carrier serving the trade was Matson Navigation Company through its Oceanic Steamship Company. In 1966 a third carrier operated by Marine Chartering Co., Inc., like PITL, of foreign-flag status, joined Matson and PITL. In January 1971, Matson withdrew its operations in the trade and sold the assets of Oceanic to another U. S.-flag operator, Pacific Far East Line (PFEL), which continues to operate in the trade. Meanwhile in the latter part of 1967, the identity of the Marine Chartering Co. operation underwent a change with the result that its operations were assumed by Polynesia Line, Ltd. Presently, therefore, there are three carriers serving the trade, namely, PITL, Polynesia Line, Ltd., and PFEL, the first two carriers operated by foreign corporations.

American Samoa is a territory of the United States consisting of six inhabited islands isolated in the middle of the South Pacific Ocean approximately 2,300 miles southwest of Honolulu. The distance between the U. S. Pacific Coast and Pago Pago, the capital, is some 4,163 miles.

Until mid-1973 PITL served a full range of South Sea Islands destinations, including Tahiti (Papeete), Western Samoa (Apia), Fiji (Suva), New Caledonia (Noumea), in addition to American Samoa (Pago Pago). Occasionally through 1972 PITL served the additional Fiji port of Lautoka, two ports in the New Hebrides and even New Guinea. The round-trip steaming distance for a typical voyage of this sort is approximately 14,200 nautical miles and encompasses some 80 days.

In mid-1973, PITL instituted a pared-down and anticipatedly more economical service, serving only the three major island ports of Pago Pago, Apia, and Papeete, reducing the round-trip steaming distance to 11,450 nautical miles and the turn-around time to some 48 days. Although in the recent past, PITL had operated at least three vessels in the trade, under the reduced service pattern described the line operated and continues to operate one vessel, the *M/V Thorsisle*, and breaks the 48-day round-trip voyage into segments of two thirds (33 days) for the outbound leg and one-third (15 days) for the inbound.

Because of the nature of the trade and the revenues to be derived from it, PITL has not utilized modern, highly-mechanized, expensive ships but rather has relied on older, conventional break-bulk vessels. The single ship presently employed, the *M/V Thorsisle*, built in 1953, however, has a substantially larger deadweight tonnage capacity than her two predecessors, at 9,530 long tons. Her bale cubic capacity is also larger, at 527,445 cubic feet, including 25,695 cubic feet of space for

refrigerated cargo.[3] This ship is also equipped with two side-ports gaining entrance to her 'tween-deck spaces. Side-port operations, which are faster than the conventional, and for which the stevedores have allowed a rate discounted by about one-half, have proved feasible only for the relatively large quantities of uniform, unitized cargo represented by the canned fish moving inbound, from one port of loading to one port of discharge. They are utilized for that movement wherever possible. Occasionally, however, because of additional cargoes on board, considerations of vessel stability hamper such use.

Neither the *Thorsisle* nor its predecessors are or have been "containerized" in the customarily accepted sense of that term. The vessels are not especially designed to carry containers and have problems in accommodating any great number of them. As a result, by far the greatest percentage of PITL's cargo complement is loaded in breakbulk, unitized parcels. Containerized movement is not entirely absent, however. At the present time PITL routinely carries between 20 and 30 20-foot containers as well as some 8-foot containers. The inbound canned fish movement is rapidly approaching the point of being suitable for a fully containerized service and PITL is exploring the possibilities. The unsuitability of the many ports previously served by PITL under its former multi-island schedule had inhibited development of such an operation.

In terms of cargo characteristics, the outbound movement to American Samoa and the other South Sea Islands is essentially a "grocery-store" type of trade. One commodity, knocked-down cans, for the two large fish canners located in American Samoa, Van Camp and Starkist, provides the single dominant outbound cargo, amounting in revenue tonnage to between 17 and 25 percent of PITL's total outbound cargo in the four years immediately prior to the current rate increase (1969–72). With the sole exception of vegetable oil in 1970, no other outbound cargo has reached even 10 percent.

Inbound, from all of the South Sea Islands, there are essentially but two commodities, both moving from the two large canners in Pago Pago, overwhelmingly, canned fish, and considerably less fishmeal and pet food of fish derivation, almost all discharged at Los Angeles. This essential difference in the cargo characteristics between the outbound and inbound movements as well as the multiplicity of loading and discharging ports on the outbound movement accounts for the 2:1 time differential between the outbound and inbound legs mentioned above.

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[3]The two predecessor ships were the *M/S Thorsgaard*, built in 1952 (renovated in 1966) with capacity of 7,850 deadweight tons and 423,090 cubic feet and the *M/S Thor I*, built in 1956, having 7,850 deadweight tonnage and 432,510 cubic feet.

A Brief Description of American Samoa

The Department of the Interior and Government of American Samoa (hereinafter "the Samoan interests") have furnished descriptive evidence relating to the islands. As mentioned, American Samoa is a territory of the United States lying in geographic isolation in the South Pacific. Its population approximates 30,000 people essentially of Polynesian heritage, all of whom are either U. S. citizens or U. S. nationals. United States sovereignty results from two treaties of cession with the chiefs of the various islands entered into at the beginning of this century and ratified by the U. S. Congress. See 48 U.S.C. 1661. In 1951, administration of the civil government of American Samoa was assigned to the Secretary of the Interior where it has remained ever since. See Executive Order 10264. In time, however, a central American Samoan government was created with executive, legislative, and judicial branches. See Revised Constitution of American Samoa (1967), American Samoan Code, pp. 19–40. The executive branch of government is headed by a Governor and Lt. Governor appointed by the Department of the Interior. Top and middle management come primarily from overseas contract employees hired for two-year periods but increasing numbers of Samoans are assuming positions of responsibility. The United States contributes approximately $14 million annually in general grant money and $5 million in categorical grants for the operation of the Government of American Samoa and its programs. Approximately $19 million is also derived from local revenue sources.[4]

An Office of Economic Development and Planning was created within the Government of American Samoa several years ago whose purpose is to foster and implement a plan to effectuate economic stability under an era of controlled gorwth and change. The Assistant Director of the Office testified as to the economic situation prevailing on the islands. He indicated that although some growth had been achieved at least in the visual sense (*i.e.*, more cars, better homes, better health) inflationary problems had worsened the economic situation and nullified progress that had been made. He was accordingly apprehensive about the possible adverse effects on the Samoan economy flowing from the subject rate increases. Not only are the islands geographically isolated but they are extremely dependent upon shipping for the importation of goods. In fiscal 1973, for example, 97 percent of the value of imports from the U. S. Pacific Coast, or

[4]This information is derived from U. S. Department of the Interior Budget Justifications FY 1975. Although not technically offered into evidence by the Samoan interests, it has not been disputed and official notice may be taken of the documents cited. Rule 13(f), 46 CFR 502.226.

$22,300,000 out of $23,000,000, were brought into American Samoa by the three ocean carriers operating in the trade, PITL, Polynesia, and PFEL. Although there are outside sources of supply, according to Commerce Department statistics, furthermore, approximately two-thirds of the imports into the islands have in recent years come from the United States.

The Samoan interests contend that the cost of living on American Samoa is "extremely high." Two exhibits prepared on two different occasions (the former in December 1973; the latter in late March of 1974) indicate that for those times shelf prices in a leading retail store appeared to be on the high side.[5] There is no evidence of record comparing each item with prices prevailing in the United States during similar times nor evidence measuring the effect of the subject rate increases on retail prices in American Samoa. The witness presented by the American Samoa Chamber of Commerce, an operator of a wholesale import business, did testify that the subject increases had caused some loss or slowdown in sales to American Samoan retailers. This witness also testified, however, that he bases his markup to retailers on landed CIF cost in Samoa. This would enable him to pass rate increases onto retailers but he also indicated that in some instances he may have reduced his customary percentage markup following the 23 percent rate increase. Interestingly, the second study of the retail shelf prices prepared in late March 1974, almost four full months after the effective date of the subject rate increases, shows no pattern of price increases over those prevailing at the time of the first study in December 1973, some items increasing, some decreasing, some remaining unchanged.[6]

These facts do not refute the contentions of the American Samoan interests regarding the dependence of the islands on ocean shipping, the rather high cost of living on the islands, or the economically depressed nature of the islands especially in view of further statistical evidence demonstrating that the islands are indeed economically depressed. For example, data pertaining to the years 1972–73 show an average salary per Samoan employee to be $3,000 per year and only $800 per capita. If higher salaried state-side workers are eliminated from consideration, moreover, average salary drops to $2,600 per annum and $650 per capita. The average minimum wage is $1.20 per

[5]For example, the exhibit prepared in December 1973 (Ex. 20D) showed hamburger at $1.54/lb., T-bone steak at $3.20/lb., hot dogs at $1.49/lb., tomatoes at $.80/lb., sugar at $1.12/5-lb., cooking oil at $6.20/gal., and coffee at $1.54/lb.

[6]As PITL points out, the second shelf-price study (Ex. 29) prepared about four months after the effective date of the rate increase was not offered as evidence showing the effect of the increase. Even if it were, however, the results are inconclusive since no pattern of increases is established. For example, although a T-bone steak rose from $3.20 to $4.16/lb., canned beef actually dropped from $1.56 to $1.46/12 oz. and reconstituted milk remained at $.40/quart.

hour and the average Samoan family consists of seven people. Some 60 to 80 percent of the Samoan wage earner's salary, furthermore, is spent on food alone. These factors have caused the Samoan household to have two, three, or four workers per household in order to afford what they need.

Of further significance, since it becomes an issue in relation to the subject rate increases, is the effort of the U. S. Congress to assist American Samoan as well as other insular possessions of the United States to export their manufactured products to the United States free of tariff duty. This assistance is provided in the General Headnotes to the Tariff Schedules of the United States, 19 U.S.C. 1202, at Headnote 3(a), and provides duty exemptions to any goods manufactured in American Samoa provided that they do not contain foreign materials to the value of more than 50 percent. To put it simply, American Samoan manufacturers can import materials from foreign sources of supply, double their value on the islands, and export the finished products to the United States duty free. Although the Samoan interests acknowledge that this system "is a significant concession by the United States Congress to benefit the economies of our island territories through the development of light industries," they express some apprehension over the effect which increases in shipping costs may have on the program. As discussed later, however, there is no substantial evidence that these apprehensions will ripen into reality.

DISCUSSION AND CONCLUSIONS

The ultimate issue for decision is whether the subject rate increases are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. Respondent is required by law to sustain the burden of proving that its proposed increases comport with the standards enunciated in the cited statutes. Section 3, Intercoastal Shipping Act, 1933, 46 U.S.C. 845. Cf. also *The Commonwealth of Puerto Rico v. Federal Maritime Commission,* 468 F. 2d 872 (D.C. Cir. 1972).

Subsidiary issues raised by the Samoan interests concern (1) whether there is a possibility of such adverse effect on the economy of American Samoa resulting from the subject rate increases that they cannot be found to be justified and (2) whether, in lieu of the proposed increases, some alternative rate changes should be ordered, which similarly satisfy the financial needs of the carrier, such as selectively increasing rates on "luxury" items while holding down rates on necessities, or imposing a greater share of the increases on the in-

bound movement to the United States, consequently diminishing the increase on the outbound movement.

PITL contends that it has amply demonstrated the need for the subject increases and that standing alone, "there is no way the rate increases here involved can be held to be unjust, unreasonable, and-/or unlawful." PITL bases its argument on the fact that incontrovertible evidence of record demonstrates that at least since 1970, the year of PITL's last general increase (10 percent) the trade has never turned a profit for the carrier and that no matter how much adjustment is made to the financial exhibits or disallowance of expenses which is made because of inability to verify some expense items for one reason or another, there is no way to show that PITL will make any profit whatsoever from this particular operation. We thus never reach the question of reasonable return to the carrier, argues PITL, and are compelled, absent any other considerations, to conclude that the rate increases cannot be found to be unjust or unreasonable under the law. *Increases in the U. S. Gulf/Puerto Rican Trade,* 14 F.M.C. 212, 213 (1971), *Transamerican Trailer Transport—Increase in U. S. Atlantic/Puerto Rico Trade,* 14 SRR 645, 658 (Initial Decision, proceeding discontinued by the Commission as moot, March 21, 1974).

PITL observes that it has demonstrated over the years a firm commitment to serve the American Samoan trade but that it is free to leave and that it enjoys no outside subsidy to offset its losses in the trade which presumably must be made up from other operations in which its owners engage. PITL furthermore observes that the record shows no evidence of gross mismanagement or inefficiencies of the type which could justify the Commission in disallowing the proposed rate increases. See, *e.g., Matson Navigation Co.—Increased Rates, Hawaiian Trade,* 16 F.M.C. 96, 99, 100, 117 (1973). On the contrary, PITL has taken steps to economize, as noted above, by reducing the number of vessels employed in the trade as well as the lengthy itineraries while maintaining an equivalent number of calls without reduction in carrying capacity.

The 23 percent increase on the outbound movement, PITL asserts, is the first general increase since 1970 and on an annualized basis, is actually lower than the overall cost-of-living increase, as shown in the Department of Labor's Consumer Price Index. While not insensitive to the concern of the Samoan shippers and economists, PITL points out that the record does not contain "hard evidence, or even projection, of economic impact at all." Nor was there any persuasive evidence showing that the "Headnote 3 (a)" program designed to assist and stimulate light industry on the islands and promote exports to the

United States, would be significantly hampered by PITL's proposed rate increases.

Finally, PITL provides reasons for the differential in the percentage increases, *i.e.*, 23 percent outbound, 12 percent inbound to the United States, in terms of additional ports of call on the outbound leg, additional time consumed on the leg in steaming and loading loose, non-uniform cargoes, in contrast to the relatively simple operations on the inbound leg, with uniform cargo (canned fish) moving from one port of loading to one port of discharge, quicker handling, and cheaper stevedoring costs. A competitive factor exists in the inbound movement as well, according to PITL, since one competing carrier maintains a lower rate in this essentially single-commodity movement.

The Samoan interests, as discussed previously, express apprehension over the possible adverse effects of the proposed rate increases on the Samoan economy whose problems they have amply described. They do not take issue with PITL's contentions regarding the carrier's financial straits and, indeed, acknowledge on brief that "the U. S. Government cannot ask PITL, or any other carrier for that matter, to subsidize the local economy by operating at a loss." They furthermore acknowledge that "PITL is expected to be allowed to make a reasonable profit in this trade; but the amount of this profit must be kept at a minimum to lessen the obvious impact any rate increase will have on the people and economy of American Samoa." These interests state that they are relying on this Commission to prevent excessive profits and further request the Commission to examine alternatives to the proposed increases, discussed above, which would alter the rate profile in the tariffs for example by allowing increases only on "luxury" items and not necessities.

Hearing Counsel agree that PITL has shown a need for the proposed rate increases and therefore urge that they be approved. They are not insensitive to the possible adverse effect which any rate increase may have on the people of American Samoa but argue that without the increase PITL would be forced to curtail its service, an event with more harmful consequences to the people of American Samoa than those which may flow from the proposed rate increases.

Hearing Counsel do not agree with every item of expense shown on PITL's exhibits but after conducting a post-hearing audit and verification procedure and making appropriate adjustments, acknowledge that despite the rate increase, PITL will still operate at a loss. Hearing Counsel do not suggest, as do the Samoan interests, that PITL's rate profiles be restructured as between "luxury" items and necessities nor do they recommend that the inbound rates ought to be increased further with a consequent reduction in the outbound rate increase.

Hearing Counsel, furthermore, do not agree with all of PITL's justifications for the lower 12 percent level of increase in the inbound movement and doubt that the inbound rates recover fully distributed costs but because of competitive factors and under applicable principles of law, contend that it was properly within the managerial discretion of PITL to hold the inbound increase on canned fish to 12 percent.

As to the ultimate issue in this proceeding regarding the justness and reasonableness of PITL's rate increases and its need for increased revenue there can be no question but that PITL has sustained its burden of proof. While there may be some question as to methodology employed in allocating certain expenses or in determining cost differences between the outbound and inbound leg, these questions do not affect the inevitable ultimate conclusion stated above. Furthermore, with regard to the issues raised by the Samoan interests concerning alteration of the rate profile or adjustment of the outbound-inbound percentages of increase, this record simply does not contain evidence sufficient to offset the fundamental conclusion that PITL's financial needs justify its proposed rate increases nor to enable this judge or the Commission to devise specific alternative rate changes which would satisfy what no party can dispute is the right of PITL to operate without incurring losses. In virtually every respect PITL's contentions, which are summarized above, as they pertain to the ultimate determinative issues in this case are supported by the record, as I now discuss.

In earlier years PITL's exhibits prepared generally in accordance with the Commission's General Order 11 format showed continual sizeable losses. For example, in calendar year 1970 the loss amounted to $198,091; in 1971, $730,463; in 1972, $435,646, despite the retirement of the line's oldest and least-efficient vessel and an upsurge of volume of cargo. Two projections made by PITL and entered into the record continued to show losses, the first, covering the period December 1, 1973—December 1, 1974, in the amount of $838,893 and the second, based upon additional experience, for the calendar year 1974, in the amount of $371,812.

The preparation of profit and loss exhibits by PITL was not accomplished without difficulty owing to the peculiar nature of PITL's operation and location. Certain items were available from the line's agent in San Francisco, GenSteam, such as revenue and port, cargo, and brokerage expense, but data relating to other critical items, such as vessel expense, depreciation, administrative and general, and other voyage expense are located in Norway. In some instances, allocation methods, such as those used to derive administrative and general expense were not only based upon data located in Norway but upon a basis other than the conventional General Order methodology,

which, in this instance, is the so-called vessel-operating-expense ratio. At the hearing PITL provided explanations as to how its exhibits were formulated. Furthermore, as mentioned above, after the hearing, at the invitation of the Presiding Judge and with the concurrence of all parties and the commendable cooperation of PITL, special efforts were made to obtain further data from Norway in order to assist Hearing Counsel and the Commission's staff to attempt to verify as much of PITL's financial evidence as possible. This unusual procedure was adopted to meet the unusual nature of this case, to which I have alluded previously, to wit, the practical problem of auditing and verifying financial statements of foreign-flag carriers with overseas locations and worldwide operations who attempt to conform their reporting requirements to the format of the Commission's General Order 11 which was designed with domestic carriers in mind.

In a continuing effort to project operating results more accurately, PITL revised its earlier calculations and prepared its final statement (Exhibit 3) approximately one month prior to the hearing held in early April 1974. The results, while showing a considerable reduction in losses from the earlier projection (from $838,893 to $371,812) still show a substantial loss despite further experience with the line's newly reduced operating pattern and utilization of revenue figures and other data from the line's most successful voyage in 1973, No. 219. Expense data from that voyage, furthermore, were averaged in with two other voyages to arrive at final figures. Vessel and other expenses allocated to the trade on the revenue ton-mile relationship basis, as currently prescribed by the Commission's General Order 11, by utilizing data from the last three voyages in 1973, Nos. 217, 218, and 219, had the result of reducing these expenses to be allocated to the trade. The post-hearing audit indicated some differences between PITL and Hearing Counsel on some of the data and certain methodologies employed, but PITL's revised computations, reducing expenses and increasing revenues substantially, as they did, tend to establish greater credibility since they run contrary to PITL's own interests, which, in a normal rate case, would be to project greater expenses and fewer revenues. PITL's final estimates are shown in the table below in summarized fashion:

PACIFIC ISLANDS TRANSPORT LINE
UNITED STATES/PAGO PAGO
INCOME ACCOUNT
ESTIMATED YEAR
1974

Operating Revenue	$2,554,500
Vessel Operating Expense	2,773,156
Gross Profit	($218,656)

Deduct:	
Administrative and General Expense	77,283
Depreciation and Amortization	75,873
Other	—
Total Loss	($371,812)

As a result of the post-hearing audit conducted by the Commission's staff, Hearing Counsel advised on brief that certain expense items could not be verified because of certain discrepancies which Hearing Counsel contend exist between PITL's exhibits and underlying materials furnished by PITL. Since Hearing Counsel acknowledge that even with adjustments made to conform with their recommendations, PITL may still expect a loss, albeit smaller, in the trade despite the proposed rate increase, there is little point in pursuing the matter of these discrepancies.[7]

It must therefore be found and concluded that PITL has shown the need for additional revenue since by anybody's calculation, PITL's or Hearing Counsel's, the line will still suffer losses in the trade despite PITL's efforts to reduce itineraries and to employ its most efficient ship in the trade. Absent any evidence of serious mismanagement or inefficiencies,[8] and putting aside for the moment considerations raised by the Samoan interests concerning PITL's rate profile, this financial evidence becomes determinative. *Seatrain Lines, California, General Increases in Rates in the U.S. Pacific Coast/Hawaiian Trade,* 14 SRR 209 (1973), *Increases in the U.S. Gulf/Puerto Rican Trade,* 14 F.M.C. 212 (1971), *Transamerican Trailer Transport—Increase in U. S. Atlantic/Puerto Rico Trade,* 14 SRR 645, 658 (Initial Decision, proceeding discontinued as moot, March 21, 1974).

I now turn to a discussion of the issues raised by the Samoan inter-

[7]Technically, Hearing Counsel's summarizing statement showing a significant loss appears on brief and is not part of the evidentiary record. If the matter were to be pursued, the record could be reopened to allow Hearing Counsel to present witnesses for cross-examination and to permit PITL to present rebuttal evidence if the line so chose. Under the circumstances, this would be a waste of time.

One further matter bears mentioning, *i.e.*, administrative and general expense. Hearing Counsel would disallow this item entirely since it was partially allocated on a "ship basis" rather than the Vessel Operating Expense ratio method prescribed in General Order 11. General Order 11, while prescribing the VOE ratio, also permits a carrier to "present additional material by way of alternative methods of allocation or other approaches to the problems inherent in this type of reporting" if they are "explained and fully reported." 46 CFR 512.3(f). The Commission furthermore specifically allowed for possible departures from the prescribed allocation methods "where in its opinion the application of such rules and regulations create unreasonable results," 46 CFR 512.3(g), and denied a claim that General Order 11 is inflexible. Docket No. 1152, Report on Adoption of Rule, 3 SRR 1083 (1964).

Since the parties have waived filing of reply briefs, this particular issue has not been fully argued nor would a detailed exploration of PITL's "ship basis" allocation change the outcome of the proceeding, as explained. In this regard, Hearing Counsel on brief specifically state: "However, we submit that it is unnecessary to decide whether Administrative and General Expenses as reported by PITL should be disallowed." Opening Brief of Hearing Counsel, p. 5.

[8]See, *e.g.*, *Matson Navigation Co.—Increased Rates, Hawaiian Trade,* cited above, at p. 117, and cases cited therein; also *D.C. Transit Sys. Inc. v. Washington Met. A. Transit Com'n,* 466 F. 2d 394 (D.C. Cir. 1972), cert. denied, 93 S. Ct. 688.

ests. Although they express concern over the impact of the proposed rate increases on the economy of American Samoa, as discussed previously, they acknowledge that PITL cannot be expected to continue operating at a loss. They therefore urge that the Commission examine alternative rate changes that may perhaps minimize any possible impact.

Every party to this proceeding, in my opinion, has shown respect for the concern of the Samoan interests. But if the Commission is to devise alternative rate changes it can only do so on the basis of substantial evidence in any formal proceeding conducted under the Administrative Procedure Act. Yet neither the limited evidence of record on point nor applicable principles of law, as discussed below, enable the Commission to find that the rate increases, considering the overall loss position of the carrier and other evidence, should be adjusted in a particular fashion either as among individual commodities or by changing the outbound/inbound levels.

It is contended that the proposed rate increases will have an adverse impact on the economy of American Samoa. As PITL points out, while American Samoa is dependent on ocean shipping without question, the evidence submitted by these interests does not gauge the extent of such impact, and indeed their witness acknowledged on cross-examination that the effect was "incapable of being measured." As mentioned previously, two exhibits showing retail shelf prices in Pago Pago in early December 1973 and late March 1974, while indicating relatively high prices, are not conclusive, and it was not even established that the second study reflected the effect of the subject rate increases.

There is scant evidence in the record exploring the distribution system in American Samoa, for example, the role of the importer/wholesaler and the markup system which might shed some light on the ultimate effect of any rate increase on retail prices. A leading importer/wholesaler who testified indicated that his business suffered some loss or slowdown in sales to retailers but that in some instances he would curtail his customary markup as a result of the rate increases. This would indicate that to some extent the effect of rate increases can be softened as far as the ultimate consumer is concerned. As far as the inbound rate increase is concerned, a matter more fully discussed below, this amounts to approximately one-half the percentage increase applicable to outbound cargoes, to wit, 12 percent, and there is similarly a dearth of evidence showing that canned fish exports from American Samoa would be significantly hindered in the American market. In fact, the Samoan interests suggest that the inbound rates might even be

raised with corresponding reduction of the opposite rate increase.[9]

On the basis of this record, therefore, and the quite proper concession by the American Samoan interests that PITL cannot be expected to operate at a loss, PITL cannot be found to have acted contrary to law in seeking additional revenue despite possible adverse impact on the economy of American Samoa. The situation here in this respect resembles somewhat that in *Transamerican Trailer Transport, Inc. Increase in Rates in U.S. Atlantic/Puerto Rico Trade,* cited above, where Administrative Law Judge Marshall stated:

> There is no denying the fact that increased freight rates increase cost to shippers and thereafter consumers. But it is equally undeniable that, after a point, increased freight rates are unavoidable if the carriers are to stay in business and the trade is to continue to receive necessary transportation services. However, it is worthy of passing note that the severity of the impact of rate increases sometimes goes beyond the reach of this Commission. This is true to the extent that it concerns the actual increases paid by the consumer and not simply the freight increases paid by the shipper. (Footnote omitted.) The carriers are under no obligation to subsidize the trade. The Commission's primary concern under the law is with the satisfaction of the island's requirement for transportation services at rates which are just, reasonable, and otherwise lawful. To be lawful the rates must be compensatory. 14 SRR at pp. 658, 659.

There remain the questions raised by the Samoan interests of the reasonableness of PITL's decision to assess the increases on commodities uniformly [10] and to hold down the inbound increases to 12 percent. Hearing Counsel, it should be noted, do not challenge the lawfulness of these decisions, and find support for the latter decision on the basis of competitive factors.

As mentioned above, however, there is insufficient evidence of record to enable the Commission to devise alternative rate changes or to alter the uniform nature of the rate increases as suggested by the Samoan interests even if applicable principles of law permitted the Commission to do so. It is true that in appropriate cases the Commission, out of concern for the economy of certain areas, *e.g.*, Puerto Rico, has applied the principle that some commodities may have to bear a higher rate than other, basic subsistence commodities. See, *e.g., Reduced Rates on Autos—N. Atl. Coast to Puerto Rico,* 8 F.M.C. 404, 408–10 (1965), *Reduced Rates on Machinery and Tractors to Puerto*

[9] This suggestion that the inbound rates might be raised appears to be somewhat inconsistent with another contention of the Samoan interests, namely, that the proposed increases in their present amounts would in some fashion interfere with the purposes of the "Headnote 3(a)" program, which, as discussed above, exempts American Samoan products from U. S. tariff duties and applies to the inbound movement to the United States unless the raw materials in the products are more than 50 percent of foreign origin. Even at the present 12 percent level, PITL correctly points out deficiencies in or the absence of evidence showing how or to what extent the canned fish movement, which is the prime inbound cargo, would be hampered or for that matter to what extent other cargo movements inbound would be hindered by PITL's proposed rate increases.

[10] There were three exceptions to the uniform 23 percent outbound increase, to wit, refrigerated cargo, lumber, and bulk vegetable oil, which were increased by 6, 6, and 10 percent respectively. No party contested these particular increases and PITL furnished explanations based upon reasonable rate-making factors affecting those items. (Exhibit 7)

Rico, 9 F.M.C. 465, 480–81 (1966). But, as noted previously, exports to American Samoa consist essentially of "grocery store" items, *i.e.*, foodstuffs. (Exhibit 20 A). Furthermore, the record does not identify and the Samoan interests do not specify which commodities are not essentials and should bear higher rates, if any such items exist. Even if this were done, however, there is a serious impediment as a matter of law to such tampering with PITL's rate profile. In addition to the fact that the principle under discussion was applied in commodity rate cases rather than general revenue proceedings,[11] the problem is that the principle stems from the Supreme Court's decision in *B & O R.R. v. United States,* 345 U.S. 146 (1953), which the Commission cited in *Reduced Rates on Autos—N. Atl. Coast to Puerto Rico,* cited above at p. 408. In the *B & O* case the Court indicated that the principle applies only if the carrier is permitted an adequate return from its traffic as a whole. In this regard the Court stated:

> So long as a railroad is not caused by such regulations to lose money on its over-all business, it is hard to think that it could successfully charge that its property was being taken for public use "without just compensation." 345 U.S. at p. 148.
>
> And so long as rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of noncompensatory rates for carrying some commodities when the public interest is thereby served. 345 U.S. at p. 150.

See also *Increased Rates on Sugar, 1962,* 7 F.M.C. 404, 412 (1962), *Pan American World Airways v. Civil Aeronautics Board,* 256 F. 2d 711, 712–13 (D.C. Cir. 1958), cert. denied, 358 U.S. 836 (1958).

With a history of continued losses and expectation of the same situation for the at least immediate future, it is obvious on this record that the principle of adjusting rate profiles as between subsistence and "luxury," non-essential items cannot be applied by the Commission.

The final suggestion of the Samoan interests that perhaps PITL's inbound rate increases from American Samoa to the United States might be raised somewhat with a corresponding reduction of the outbound increases is similarly too unspecific and lacking in support either on the record or under applicable principles of law. In making this suggestion, furthermore, even the Samoan interests indicate that there "may be a risk here" referring presumably to their earlier contentions that rate increases inbound from American Samoa to the

[11] Since this proceeding is a so-called "general revenue" investigation into an across-the-board revenue increase, the Commission's Order of Investigation and Suspension does not specify any issues pertaining to individual commodity rates. Under these circumstances, as the Commission has stated in a comparable situation, "it is doubtful whether such an exercise [*i.e.*, taking evidence on indivudual rates] would be proper in a general revenue proceeding where the issue is not raised by the Order of Investigation." Docket No. 74–36, *Matson Navigation Company—Increase in Rates on Motor Vehicles,* Order on Investigation and Suspension, served August 29, 1974, p. 2, 39 *Federal Register* 32057.

United States may reduce the competitive advantages enjoyed by American Samoan exports under the "Headnote 3(a)" program and jeopardize the continued operation of the tuna industry on the islands.

The Samoan interests do not challenge the 23 percent outbound rate increases in any specifics nor do they show that this particular level was unnecessary or unreasonable. Their contention essentially consists of a suggestion that "it may well be that the outbound freight from American Samoa could bear a greater share of the increase than is presently proposed." Although not spelled out in detail, presumably a larger inbound increase would enable PITL to reduce the outbound increases to some figure below 23 percent.

The record contains detailed explanations by PITL as to how it derived the 23 percent figure for the outbound increases, which were not challenged or disputed on brief. Very briefly, the particular increase is due to increases in expense, principally in U. S. longshore wages (amounting to just under 40 percent in the three years since the previous rate increase in 1970) and an estimated annual 10 percent increase in vessel operating expense. Since the last general rate increase in the trade occurred on June 1, 1970, this percentage approximates 7 percent per annum measured from the previous increase or to less than 6.5 percent if we consider that the proposed increases were delayed another half year until December 1, 1973. PITL submitted further evidence showing that from January 1, 1966, to January 1974, a period covering the earlier 1970 increase as well as the present, PITL's rates increased only some 35 percent, a figure lower than the corresponding rise in the Consumer Price Index in the United States, occurring between January 1, 1966, and September 30, 1973, which was 41.9 percent.

Since the Samoan interests have not shown or contended that the 23 percent level of increase or the particular calculations employed by PITL to derive this figure are unreasonable or that the increase will even enable PITL to turn a profit in the trade, I cannot find any violation of law in connection with this particular figure.[12] Nor can I find on this record and under applicable principles of law that the inbound rate increase should be raised above the 12 percent level in the hopes that this might result in a reduction in the outbound increases.

Under applicable principles of law, a carrier may hold down increases on certain commodities provided that the resulting rates produce revenues sufficient to cover at least out-of-pocket costs so that no

[12] As discussed below, Hearing Counsel also do not contend that the 23 percent increase is unreasonable although disputing PITL's statements that vessel expense for the outbound leg is twice that for the inbound and PITL's consideration of vessel days on each leg as a factor in comparing vessel expense for each leg.

other rate payers are burdened with direct costs attributable to the lower-rated cargoes. In fixing rate levels between direct costs, *i.e.*, the extra expenses incurred as a result of carrying the particular commodity and fully distributed costs including overhead, depreciation, and a reasonable profit, a carrier may consider competitive factors and the possibility that further increases may result in cessation of movement or loss of the commodity to a competing carrier. These principles have been followed by the Commission in a number of cases.[13]

A recent case in which these principles were applied is *Matson Navigation Company—General Increase in Rates in the U. S. Pacific-/Hawaiian Trade,* 16 F.M.C. 96 (1973). In that case the carrier increased outbound rates by 12–1/2 percent but filed no increase at all on inbound containerized cargoes, principally canned pineapple. The Commission specifically rejected the idea that the carrier should have imposed an increase on the inbound cargoes so as to reduce the 12–1/2 percent level of the outbound increase since the carrier had shown that the increased revenue would not result in an excessive return and the record did not show that the lower inbound rates fell below out-of-pocket costs so as to burden outbound rate payers. 16 F.M.C. at pp. 100–103. Furthermore, the Commission found that the holddown on the inbound pineapple rate was a reasonable business judgment based upon competitive factors, principally a strong possibility of diversion to other carriers with consequent loss of revenue and increased upward pressure on outbound rates.

In the present case, PITL did not, like Matson, exempt inbound commodities, principally canned fish, from any rate increase. As we have seen, these rates were increased by 12 percent. Furthermore, PITL justified the decision on several grounds, namely, costs and competition. PITL cites the fact that one competing carrier maintains a lower rate and that further increases imposed on the PITL rate would lead to erosion of traffic to the lower-rate competition. As PITL points out and as the Commission noted in the *Matson* case, the loss of revenue could lead to further increases in the outbound rates. This contention is supported by the fact that PITL estimates for the year 1974 that canned fish moving inbound will produce roughly one-half of PITL's total revenue tons moving in both directions and over 40 percent of total revenue.[14]

[13]See, *e.g.*, *Matson Navigation Company—Reduced Rates on Flour,* 10 F.M.C. 145, 148, 149, 153 (1966), *Investigation of Increased Rates on Sugar/Puerto Rico Trade,* 7 F.M.C. 404, 411–13 (1952), *Aleutian Marine Transport Co. —Rates Between Seattle and Ports in Alaska,* 7 F.M.C. 592, 596 (1963).

[14]The figures as shown on Exhibit 3, Schedule V, are as follows:

Canned Fish (inbound)	25,538	revenue tons	$1,042,500
All other (outbound)	25,867	revenue tons	1,512,000
	51,405		$2,554,500

Like the situation in the *Matson* case, furthermore, competition on the inbound movement from American Samoa seems to be intense. There are two large canneries that control virtually all of the canned fish moving inbound and two other carriers with whom PITL must compete, one of whom maintains a lower rate as mentioned.[15]

PITL also offered cost increases to justify the 12 percent inbound rate increase. It was explained that increased labor costs on the Pacific Coast and increases in vessel expense which together totalled slightly over $4.00 per revenue ton justified the increase in the subject rate from $33 to $37 per ton, or 12 percent. Hearing Counsel take no issue with PITL's need for additional revenue on the inbound leg because of these cost increases. Furthermore, Hearing Counsel submit that the rate for canned fish appears to cover loading and unloading expenses and makes some contribution to vessel expense, although doubting that the rate recovers fully distributed costs. If so, the rate is not unlawfully depressed under applicable principles of law explained above. There is some record support for Hearing Counsel's statements, although no fully distributed cost study was entered into the record.[16] PITL submitted evidence, moreover, tending to explain the lower inbound percentage increase on the grounds of the uniform nature of inbound cargo and consequent efficiencies in loading and unloading, resulting in lower handling costs compared with cargo moving outbound. Hearing Counsel do not take issue with these facts nor with PITL's decision to limit the inbound rate increase to 12 percent, as I have mentioned above.[17] Therefore, in consideration of

[15]According to tariffs on file with the Commission, the competing carrier having the lower rate is PFEL. As of December 1, 1973, when PITL's rate increases went into effect, PFEL maintained a rate of $36 per 2,000 lbs. on canned fish compared to PITL's rate of $37. Even after the imposition of bunker surcharges, effective February 15, 1974 (12 percent for PFEL, 10 percent for PITL), PFEL's total charge remains slightly below that of PITL although the differential has narrowed. See PFEL America Samoa Freight Tariff No. 1, FMC-F No. 6, 4th rev. page 18 and previous pages 18, 5th rev. page 15; PITL Tariff FMC-F No. 2, 4th rev. page 17, 4th rev. page 14A.

[16]The canned fish rate with the proposed increase is $37 per ton. Costs of discharging at the Pacific Coast increased from $9.00 to $12.53 (Exhibit 6). Even if this expense is doubled to cover loading costs in Pago Pago, although costs there are cheaper, so as to produce stevedoring costs of approximately $25, the rate is obviously well above that level.

[17]Hearing Counsel do take issue, however, with PITL's statements that vessel expenses on the outbound leg are twice as much as those on the inbound, owing to greater number of ports covered, more vessel days, overtime, etc. Hearing Counsel dispute furthermore that consideration of vessel days rather than ton-miles is proper, citing *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, 9 F.M.C. 220 (1966). In view of the overwhelming showing of need for additional revenue by PITL, Hearing Counsel's support for the rate increases both inbound and outbound on other grounds, the lack of showing that PITL's methodology resulted in high rate increases not otherwise justified, and the further fact that this allocation issue has not been fully argued since the parties waived the filing of reply briefs, this particular issue, as was the case with the issue regarding PITL's allocation of administrative and general expense, need not be resolved. Since even with a 23 percent increase outbound, PITL still stands to suffer losses and has justified its holddown on inbound increases on other grounds to 12 percent, it is pointless to pursue this particular allocation issue further. Had there been a viable rate of return issue in this proceeding and lack of independent justification for the inbound holddown, the issue of allocation of vessel expense between outbound and inbound legs might have become critical. PITL acknowledges that its methodology in deriving these rate increases may not be perfect but correctly points out that exactitude is not required in such cases. *Sea-Land Service, Inc.—Increases in Rates in the Pacific Coast/Puerto Rico Trade*, 15 F.M.C. 4, 9–10 (1971).

the facts and applicable principles of law, as discussed above, I find nothing unlawful in PITL's decision to limit the inbound rate increase to 12 percent.

ULTIMATE CONCLUSIONS

Respondent PITL has shown a need for its general rate increases on the basis of increased costs and continued losses in the subject trade. Even with the benefit of such increases, furthermore, the record shows that PITL will still suffer losses. Accordingly, respondent has sustained its burden of proving the subject increases to be just and reasonable as required by law.

The economy of American Samoa is highly dependent on ocean shipping and suffers from economic problems relating, among other things, to low income and rather high retail prices. This situation, of course, is of concern to the Commission but standing alone is insufficient to offset PITL's right to seek additional revenue, the need for which PITL has shown. Since PITL continues to be in an overall loss position, furthermore, and since the record is lacking in specific evidence on the point, the Commission cannot invoke the doctrine, as it sometimes does, of altering the nature of PITL's rate profile, as the Samoan interests suggest, *e.g.*, by raising rates on non-essential items and holding down rates on subsistence items. Nor is there sufficient support in the record or under applicable principles of law for the Commission to order PITL's inbound rate increase to be raised above the 12 percent level, which level PITL has justified on the basis of competitive factors.

PITL, a foreign-flag operator serving an isolated American territory, cannot be compelled to continue serving that area or to continue operating at a loss. On the present record, denying the proposed rate increase or otherwise attempting to modify it without providing the carrier with compensating revenue might remove any incentive for the carrier to continue to serve the trade or possibly cause a curtailment of service, as Hearing Counsel suggest. It might well be, as Hearing Counsel further suggest, that withdrawal of PITL from the trade would do far more harm to the people of American Samoa than the requested rate increases. In any event, PITL has proven its case and there is no need to take the gamble.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 7, 1975.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–78

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

TRANSAMERICAN TRAILER TRANSPORT, INC.

ADOPTION OF INITIAL DECISION

Feb. 3, 1975

This case was instituted by complaint of eight Philadelphia area parties [1] alleging that Transamerican Trailer Transport, Inc. (TTT), by soliciting and encouraging shippers located in the Port of Philadelphia (the Port) area to move their cargo through other ports of exit or entry, specifically Baltimore and New York, has in the past and is continuing to divert cargo illegally from the Port.

Specifically, Complainants allege that such actions of diversion or attempted diversion of "naturally tributary" cargo are unlawful and illegal under sections 16 and 17 of the Shipping Act, 1916 (the Act), and section 8 of the Merchant Marine Act of 1920 (the MMA). Complainants further contend that any cargo diversions on the part of TTT are detrimental to commerce and the general public interest, and unfair, unjust, discriminatory, and unduly prejudicial to the Port and to the individuals and business concerns which are interested in and dependent upon said Port.

This proceeding is now before the Commission on exceptions to the Initial Decision of Administrative Law Judge John Marshall in which he found that solicitation by TTT, without more, of said Philadelphia area cargo is not in violation of the Act or the MMA.

Exceptions to the Initial Decision filed by Complaints generally constitute nothing more than a reargument of contentions already

[1] Complainants are the Delaware River Port Authority, the Commonwealth of Pennsylvania, the City of Philadelphia, the Philadelphia Port Corporation, the International Longshoremen's Association, Philadelphia District Council, the Philadelphia Marine Trade Association, the Port of Philadelphia Marine Terminal Association, and the Greater Philadelphia Chamber of Commerce.

briefed by Complainants and considered by the Administrative Law Judge. Upon thorough consideration of the entire record in this proceeding, we are of the opinion that Judge Marshall's findings and conclusions with respect thereto were proper and well founded, and we adopt them as our own. However, without disturbing any of these findings and conclusions, there are certain procedural matters raised by Complainants in their exceptions which we believe warrant some further discussion.

The overriding issue in this proceeding is whether the Administrative Law Judge was correct in deciding, as a matter of law, that the mere solicitation of cargo, without more, was not violative of the shipping statutes, for from this challenge raised by Complainants flowed virtually all other exceptions. We believe that Judge Marshall's assessment was legally correct, and accordingly we also agree with his decision to forego an evidentiary hearing. To find otherwise would be stretching both the naturally tributary concept and arguments of discrimination and prejudice to an intolerable extreme and wreak havoc on the shipping industry.

We are convinced that throughout the course of this proceeding Complainants were offered every procedural safeguard as required by both our own rules and the Administrative Procedure Act. Upon admission by Respondent of the facts in dispute at the prehearing conference, Judge Marshall was most solicitous in offering Complainants the opportunity to amend their Complaint to address additional issues related to absorption and equalization not addressed in the Complaint as filed. Complainants, after requesting time to do so, chose not to amend the Complaint. In granting oral argument we offered Complainants even further opportunity to present any legal arguments in their own behalf, and upon conclusion of argument even took the extraordinary if not unprecedented step of granting Complainants fifteen days to supply us with additional affidavits of fact and memoranda of law in support of their position as delineated in the original Complaint. Instead, Complainants submitted a response which failed to address itself in any way to the issue of law at hand, and instead requested consolidation with either of two other ongoing Commission proceedings, Docket Nos. 73–35-*Intermodal Service of Containers and Barges at the Port of Philadelphia; Possible Violations of the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933,* and 74–44-*Agreement Between Puerto Rico Maritime Shipping Authority and Puerto Rico Marine Management, Inc./Puerto Rico Marine Operating Company, Inc.*

We address ourselves now to one other area of exception raised by Complainants. Their contention that Judge Marshall somehow erred

in mentioning the decision of the Court of Appeals for the Third Circuit in the injunction proceeding in *Delaware River Port Authority et al. v. TTT,* U.S.C.A. 3d Cir. No. 74–1214, 7/30/74, carries no weight when viewed in the context of its inclusion in the Initial Decision. Complainants suggest that any "reliance" by the Administrative Law Judge on that Court of Appeals decision is improper because the Commission's General Counsel submitted an amicus brief in that proceeding. This argument is totally without merit. Complainants' suggestion that the General Counsel's limited intervention in the injunction appeal proceeding was "clearly improper" and demonstrated that he had "prejudged the merits of this proceeding" thereby tainting it is wholly unwarranted and unsupported.

First, the amicus brief filed by the General Counsel addressed itself solely to the propriety of an injunction in view of the *probable* Commission resolution of the mere solicitation issue on the basis of its prior decisions in the general field of cargo diversion. Second, we would remind Complainants that such briefs filed in court proceedings by the General Counsel are filed on behalf of the Commission, and we recognize no prejudice to any party's case in pending or subsequent proceedings before the Commission. It is *our* duty as Commissioners to render a fair decision and we accept that duty in this case as in others brought before us.

In conclusion, we would emphasize that the Commission has made every effort to insure that due process requirements were met throughout this proceeding. There was no need for evidentiary hearing, as Respondent stipulated and admitted the facts and allegations that it does solicit cargo in Philadelphia and that it does not intend to call there for cargo. Quite simply, Complainants failed to meet their burden of proof on the legal issue at hand. Their attempt at this time to again raise the issue of consolidation, which was previously carefully and definitively denied at all stages of the proceeding, strikes us as nothing less than an attempt to forestall a decision on the main issue raised here and to illegitimately marry the issues of mere solicitation and overland cost absorption through consolidation.

The time has long since passed for this case to be put to rest. We therefore adopt the Initial Decision in full as the decision of the Commission and dismiss the Complaint.

By the Commission

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

NO. 73–78

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

TRANSAMERICAN TRAILER TRANSPORT, INC.

Transamerican Trailer Transport, Inc., solicitation, without more, of Philadelphia area cargo for movement through ports of Baltimore and New York found not in violation of the Shipping Act, 1916, or the Merchant Marine Act of 1920.

Martin A. Heckscher for complainant Delaware River Port Authority.

Israel Packel and *Gordon MacDougall* for complainant Commonwealth of Pennsylvania.

Martin Weinberg and *Herbert Smolen* for complainant City of Philadelphia.

M. Carton Dittmann, Jr., for complainant Philadelphia Port Corporation.

Abraham E. Freedman for complainant International Longshoremen's Association, Philadelphia District Council.

Francis A. Scanlan for complainants Philadelphia Marine Trade Association and Port of Philadelphia Marine Terminal Association.

Thomas V. Lefevre for complainant Greater Philadelphia Chamber of Commerce.

Amy Klein and *Olga Boikess* for respondent Transamerican Trailer Transport, Inc.

Eldered N. Bell, Jr., for intervenor Maryland Port Administration.

INITIAL DECISION OF JOHN MARSHALL, ADMINISTRATIVE LAW JUDGE [1]

Complainants consist of six parties concerned with the welfare of the Port of Philadelphia. Respondent, Transamerican Trailer Transport, Inc. (TTT), operates a common carrier steamship service, twice

[1]This decision became the decision of the Commission 2/3/75.

weekly between New York and San Juan and once weekly between Baltimore and San Juan. It does not call at the Port of Philadelphia.

There are no disputed issues of fact. TTT agrees to complainants' only substantive allegation which is that TTT has, by means of advertising and personal visits, successfully solicited Puerto Rican cargo, both inbound and outbound, in the Port of Philadelphia area for movement through the ports of Baltimore and New York.[2] This action, complainants allege, constitutes "illegal diversionary solicitation" . . . illegal because they consider it to be detrimental to commerce and the general public interest; unfair, unjust, discriminatory and unduly prejudicial to the Port of Philadelphia and to individual business concerns. They further urge that it permits TTT, solely for its own benefit, unlawfully to encourage and persuade shippers and consignees not to move their cargo via the normal port of exit or entry; results in the disruption of long established patterns of commerce by diverting cargo away from the natural direction of its flow through the Port of Philadelphia; enables respondent to draw away from the Port of Philadelphia traffic which originates or terminates in areas naturally tributary to its port and that it will unduly concentrate shipping services in one or two areas in the North Atlantic range of ports contrary to the policies of Congress as set forth in its various acts, including, *inter alia*, the Shipping Act of 1916 and the Merchant Marine Act of 1920, all of which, they emphasize, are intended to encourage the development of ports and transportation facilities adequate to handle interstate and foreign commerce in peace time and to enhance the security of the United States in times of national emergency.

Complainants do not suggest that TTT has engaged in absorption, equalization or other means of offsetting or payment of inland charges.[3] Under trucking tariffs on file with the Interstate Commerce Commission it appears that all such charges are payable by the shipper.[4] Therefore, the only issue in this case is an issue of law. May a common carrier offshore steamship service, while offering no monetary or other added inducement, lawfully solicit cargo for movement through ports in adjacent areas? Data sought by complainants to reflect tonnages and revenues of cargo carried, the availability of other

[2]See order entitled Briefing Schedule, dated April 9, 1974, and Commission order, dated May 3, 1974, denying appeal. In view of the specific findings and repeated rulings that this proceeding is limited to an issue of law, i.e., the matters of law asserted in the complaint, the request for findings of fact contained in complainants' brief is patently out of order and requires no response.

[3]Complainants were granted but later rejected leave to amend the complaint to include whatever charges there might be, if any, bearing on such practices.

[4]See *Delaware River Port Authority v. T.T.T.*, No. 73-2830, Dist. Court for the Eastern Dist. of Pa., mimeo opinion, Findings of Fact, Discussions and Conclusions of Law, dated February 4, 1974, Finding of Fact No. 6. The record of this proceeding is cited in the brief of complainants herein. For subsequent decision on appeal, reversing the Dist. Court, see slip decision No. 74-1214, USCA, 3d Cir., July 30, 1974.

services, the coverage of respondent's solicitation and the impact on the Port of Philadelphia would be without relevancy. On this record,[5] the solicitation in question is either illegal as a matter of law or it is not illegal. As noted above, complainants charge that it violates sections 16 and 17 of the Shipping Act, 1916, and section 8 of the Merchant Marine Act of 1920.

The portions of these acts as cited in the complaint and referenced by complainants on brief are as follows: [6]

Section 16 (46 USC 815):

> It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17 (46 USC 816):

> No common carrier by water in foreign commerce [7] shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. . . .
>
> Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Section 8 (46 USC 867):

> It shall be the duty of the Secretary of Commerce, in cooperation with the Secretary of the Army, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which he has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; . . . and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: . . .

In briefer, statutory language, complainants' charge is that TTT's solicitation alters the natural direction of the flow of commerce by diverting cargo which is naturally tributary to the Port of Philadelphia, thus violating the promotional mandate of section 8 of the 1920

[5] Consisting of the complaint, answers thereto, opening briefs and reply briefs. Complainants, however, did not choose to file a reply brief.

[6] Complainants' brief also refers to sections 15 and 18 of the Shipping Act, 1916, 46 USC 814 and 17 but the complaint makes no mention of either.

[7] TTT's mainland-Puerto Rico service is actually in so-called domestic offshore commerce rather than foreign commerce.

Act requiring consideration of "the natural direction of the flow of commerce" and the prohibitions of sections 16 and 17 of the 1916 Act outlawing discriminatory and otherwise unjust or unreasonable practices by common carriers by water.

While section 8 is not specifically administered by the Commission the policies therein set forth have been given weight in applying relevant sections of the 1916 Act.[8] In *Reduced Rates on Machinery and Tractors to Puerto Rico,* 9 F.M.C. 465, 476 (1966), the Commission summed up its treatment of section 8 as follows:

> This right [the right of a port or carrier serving that port to cargo from naturally tributary areas] is codified in section 8 of the Merchant Marine Act, 1920, which, as a statement of congressional policy, although not one specifically appearing in the statutes we administer, should be, and has been, followed by this Commission whenever possible.

Port of New York Authority v. F.M.C., 429 F. 2d 663, 668 (5th Cir. 1970), is cited by complainants in support of their reliance on the "natural tributary rule":

> Section 8 of the Merchant Marine Act, supra, is a policy statement designed to promote and encourage the use of ports by vessels for the handling of freight which would naturally pass through such ports. This is the basis of the natural tributary argument.[9]

Complainants then seek to draw upon the Commission's recent decision in *Intermodal Service to Portland, Oregon,* Docket No. 70–19, 14 SRR 107 (1973), to support their contention that it is "the fundamental federal policy to protect the right of a port to all cargo which would naturally flow through it," and that any action by anyone contrary to that policy, including solicitation in any form, constitutes illegal diversion. This is the real heart of complainants' case. As a clear-cut issue, it is without precedent.

Under the above-quoted statutes, the "diversionary solicitation" here in question may be found to be illegal only if, under the circumstances, it subjects the port of Philadelphia to undue, unjust or unreasonable prejudice or disadvantage in some respect. And so the right of the port of Philadelphia to cargo from otherwise naturally tributary areas is violated only if the means of diversion can be found to constitute an undue, unjust or unreasonable practice. No basis is found in this record or elsewhere for concluding that advertising and/or direct customer solicitation, without concessions or other added inducement of some kind, is illegal.

Service to Portland, supra, involved the carriers serving Portland

[8]Functions under section 8 are now vested in the Maritime Administration, Department of Commerce.

[9]See also *Pacific Far East Line, Inc. v. U.S., et al.,* 246 F. 2d, 711, 716 (D. C. Cir. 1957) and *Intermodal Service to Portland, Oregon,* Docket No. 70-19, 14 SRR 107, 110 (1973).

indirectly through Seattle under a conference agreement provision whereby the carriers absorbed the inland transportation costs. The issue there which is cited by complainants as relevant to this case actually went *not* to the lawfulness of the indirect service as such but rather to the indirect service as induced by the absorption of the inland costs.[10] Absent the issue of absorption, which is not in this case, there might not have been a *Service to Portland* case. At the outset of its decision in that case, the Commission emphasized the restricted scope of the proceeding as having to do with ". . . the establishment of regular service to Portland, Oregon, from Far Eastern ports under which cargo destined to Portland is discharged from a vessel at Seattle, Washington, and transported by inland carrier to Portland, Oregon, *at ocean carriers' expense. . . .*" *Id.* at 109.

The remaining decisions relied on by complainants are also misapplied as in each instance the diversion was accompanied by and presumably encouraged by monetary inducements termed "absorptions" or "equalizations." [11] Complainants' contention that, the cargo being naturally tributary to Philadelphia, any effort or device, called solicitation or anything else, and whether or not accompanied by monetary inducement, ". . . is a clear violation of the statutes" is without merit.

This case does not involve questions relating to the present adequacy, or any foreseeable reduction, of direct service to Philadelphia. TTT does not call at Philadelphia and has indicated no intention to do so. In urging the use of the Port of Philadelphia by local shippers, complainants contend that presently available direct service between Philadelphia and Puerto Rico is adequate. There is no suggestion to the contrary.

TTT, in offering indirect routings, merely makes known its services. As noted above, it does so through conventional means of advertising and personal visits. No record is found to indicate that the Commission has ever even considered imposing a ban on this form of soliciting by carriers. All carriers everywhere solicit cargo. They endeavor, by advertising and talking to shippers, to encourage the use of their services, whether direct or indirect. Unless there are improper concessions, rules or practices, there are no grounds for charges of illegal conduct. Solicitation by itself is not illegal. Shippers in the Philadel-

[10] As this is not a section 15 agreement case, policies and standards sometimes looked to *in disapproving agreements* found to be detrimental to the commerce of the United States or contrary to the public interest are not applicable.

[11] *Port of New York Authority v. FMC*, 429 F. 2d 663 (5th Cir. 1970), "absorption of inland differentials"; *Pacific Far East Line, Inc. v. U.S. et al.*, 246 F. 2d 711 (D.C. Cir. 1957), "equalization practices"; *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941), "equalization by absorption"; *Sea-Land Service, Inc. v. S. Atlantic & Caribbean Line*, 9 F.M.C. 338 (1936), "port equalization"; *City of Portland v. Pacific Westbound Conference*, 4 F.M.C. 664 (1955), "equalization practices"; and *City of Mobile v. Baltimore Insular Line*, 2 U.S.M.C. 474 (1941), "equalization rates."

phia area who choose to ship via TTT out of Baltimore or New York undoubtedly do so for valid business reasons other than comparative costs. Such reasons may include schedule frequencies, overall transit times, or the configuration of a particular vessel.

This is not to say that the offering of indirect services accompanied by monetary inducements is intrinsically unlawful. Each case of this nature must be judged in its entirety. The Commission must take into consideration all of the material facts. In *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 (1941), the Commission stated that the practice of equalization is not condemned as a general principle but that it is condemned when it creates an undue advantage. Along the same line, the Commission in *Service to Portland, supra*, at 130, stated, in substance, that it is not indirect service which may be unlawful but rather absorption and that only to the extent that it subjects a port to undue prejudice or unjust discrimination.

Complainants' contention that "a water carrier may not handle a port's local cargo by any means other than direct water service to that port" (brief fn. at 18) is not accurate.

TTT argues that to grant the relief requested by complainants would be to Balkanize the shipping industry and bestow feifdom rights to Philadelphia port interests, thereby foreclosing competition among ports and carriers and needlessly restricting shippers' access to shipping services, all clearly contrary to anyone's definition of individual rights and the public interest. The principle, if adopted, could equally well support litigation by the Ports of New York and Baltimore seeking to expel Philadelphia solicitors from their claimed tributary areas. Many ports maintain trade solicitation offices throughout the world.

CONCLUSION

Neither the "naturally tributary concept" of section 8 of the 1920 Merchant Marine Act, nor the proscriptions of sections 16 and 17 of the 1916 Shipping Act relating to unjust, unreasonable, or discriminatory actions, vest a port with a monopoly over local cargo. These provisions simply mean that improper rate making devices may not be employed to channel the flow of cargo elsewhere. Unless barred by restrictions not here in issue, all carriers and all ports have a right to fairly compete for all cargo.[12]

It is accordingly found and concluded that there is no basis in law for restricting TTT from soliciting cargo, by means of advertising and

[12]There are, of course, basic constitutional freedoms which are relevant but need not be given detailed consideration in this instance. Shippers have a right to transport their property by whatever lawful means they may choose, Article I, section 8, Regulation of Commerce. No preference may be given to ports of any state, Article I, section 9. Carriers and ports have a right to inform shippers of lawful services offered, First Amendment.

personal visits, from shippers in the Philadelphia area even though TTT does not bring its ships into the Port of Philadelphia.

The relief requested is denied and the complaint dismissed.

(S) JOHN MARSHALL,
Administrative Law Judge.

WASHINGTON, D. C.,
August 28, 1974.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NOS. 303(F) AND 304(F)

JOHNSON & JOHNSON INTERNATIONAL

v.

PRUDENTIAL-GRACE LINES, INC.

Reparation granted.

Axel O. Velden for Complainant.
Anthony R. Maio for Respondent.

REPORT

Decided Feb. 3, 1975.

BY THE COMMISSION: (Helen Delich Bentley, *Chairman* and James V. Day, *Vice Chairman*)

The complaints in these consolidated proceedings were filed by Johnson & Johnson International (J & J), alleging overcharges on shipments of products via vessels of Respondent Prudential-Grace Lines, Inc. (Grace). Administrative Law Judge Norman D. Kline has issued an Initial Decision awarding reparation in the amount of $397.01. Exceptions to that decision have been filed by J & J, to which Grace has replied.

FACTS

Grace transported the shipments involved here pursuant to the terms of the United States Atlantic and Gulf/Venezuela and Netherlands Antilles Conference Freight Tariff, F.M.C. No. 2, and the East Coast Colombia Conference Freight Tariff, F.M.C. No. 1. Both tariffs contain a rule which provides as follows:

> Bills of lading describing articles by trade name are not acceptable for the commodity rating. . . . Bills of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S. as minimum.

On September 29 and October 27, 1972, J & J shipped cargoes of its product "ALIPAL" from New York, New York, to Puerto Cabello, Venezuela, on Grace's vessels and subject to the terms, conditions and rates of the Venezuela and Netherlands Antilles tariff. In the case of each shipment, the cargo was described on the bill of lading merely as "ALIPAL". To one of these shipments Grace applied the "Cargo, N.O.S." rate of $93.50 per 40 cubic feet. To the second of these shipments Grace applied the "Chemical, N.O.S." rate of $77.00 per 40 cubic feet.[1] As to both of these shipments, Complainant alleges that the proper rate to be applied was "Detergent, N.O.S." at $43.50 per 40 cubic feet. Since this lower commodity rate was not applied, Complainant alleges that it has been overcharged in the amount of $286.74 on these shipments of ALIPAL.

On September 19, 1972, Complainant also made a shipment of the product "Compound T.L." from New York, New York, to Barranquilla, Colombia, aboard Grace's vessel. This cargo was shipped subject to the terms, conditions and rates of the East Coast Colombia tariff described above. To this cargo, described as "Compound T.L." on the bill of lading, Grace applied the "Chemical, N.O.S." rate of $96.80 W/M.[2] Complainant alleges that the correct rate to have been applied was $61.80 W/M applicable to "Detergents, washing: Liquid" and that Grace's failure to apply this rate resulted in an overcharge of $110.27 on the shipment of "Compound T.L."

In defense of its application of the "Cargo, N.O.S." and "Chemical, N.O.S." rates, Grace relied upon its adherence to its tariff rule quoted above and maintains that it applied the provisions of its tariffs properly, based upon the cargo description information supplied by Complainant.

THE INITIAL DECISION

In his Initial Decision, Judge Kline stated:

> There are essentially two issues raised . . . : (1) whether a claim based upon alleged misclassification by a carrier can be valid despite the fact that claimant furnished the carrier an improper or incomplete description of the commodity shipped on a bill of lading at the time of shipment in apparent noncompliance with the carrier's tariff rules, on which description the carrier relied in determining the applicable rate; and (2) if such a claim is valid, whether claimant has shown that the commodities involved in the shipment in question, described as "Alipal" and "Compound T.L." on the pertinent bills of lading, are in fact detergents, thereby qualifying for the rates published in respon-

[1] It is not clear why Grace applied the Chemical, N.O.S. rate to the second cargo rather than an "automatic" application of the Cargo, N.O.S. rate as provided in its tariffs.

[2] Again, it is unclear why the Cargo, N.O.S. rate was not applied here. However, in the case of this shipment, at the time of shipment the Cargo, N.O.S. rate was $87.00 per 40 cubic feet, while the Chemical, N.O.S. rate was $96.80 W/M.

dent's tariffs under the designations "Detergent N.O.S." and "Detergents, Washing: Liquid" respectively.

As to the first issue, Judge Kline concluded that numerous previous Commission decisions hold that such a claim is valid provided the appropriate burden of proof is sustained by the Complainant.

As to the second issue, Judge Kline concluded that Complainant had sustained its burden of proving that the commodities actually transported were detergents and should have been assessed the tariff rates applicable to detergents.[3] Further, citing *Abbott Laboratories v. Prudential-Grace Lines,* Informal Docket No. 262(I), Order on Review of Initial Decision, November 12, 1973, Judge Kline concluded that Complainant's failure to comply with Respondent's tariff rule could not bar recovery for an overcharge should Complainant sustain its burden of proof regarding the character of the commodity. Judge Kline, therefore, awarded reparation as requested by Complainant in the amount of $397.01.

In its exceptions, Respondent argues that Judge Kline's ". . . finding was improper as Complainant did not comply with the provisions of a mandatory tariff regulation." Further, Respondent contends that to sustain the holding of Judge Kline would be discriminatory since it imposes no responsibility upon the shipper to describe his goods accurately while leaving the carrier open to later claims against which he may be unable to defend.

DISCUSSION AND CONCLUSION

We have reviewed this proceeding in light of our recent decisions in *Kraft Foods v. Moore McCormack Lines, Inc.* (Docket No. 73–44, report served March 26, 1974), and *Ocean Freight Consultants v. Royal Netherlands Steamship Company* (Docket No. 72–39, report served January 30, 1975). In this instance, we wish to reiterate that a claim such as here under consideration may not be shown to fall within the ambit of *Kraft Foods.* We emphasize that we are constrained to limit the *Kraft Foods* holding strictly within its purposely narrowed limits.

In the case before us, we conclude that the ultimate holding of the Administrative Law Judge allowing reparation must be permitted to stand in light of our decision in Docket No. 72–39, *supra.* In that case, while we indicated our favorable disposition toward a mandatory "trade name" rule, we disallowed reliance by the carrier on a rule

[3]The record as to the character of the commodity shipped consists primarily of definitional materials which show ALIPAL and "Compound T.L." to be, in fact, detergents. In its material offered to establish the identity of "Compound T.L.", Complainant also furnished a statement from the manufacturer which corroborates its characteristics as a detergent.

which allowed discretion in the application of rates and which, therefore, opened a door to discriminatory treatment of shippers by carriers.

The rule sought to be relied on here contains the same discretionary deficiency we found in Docket No. 72–39.

We are of the opinion that the case before us is indistinguishable in any material way from the facts of Docket 72–39. That being so, we hold as we did there that reparation is warranted and is hereby granted.

Commissioner George H. Hearn, concurring and dissenting.

I concur in the grant of reparation in this case, but I dissent from the reasoning of Chairman Bentley and Commissioner Day.

The reasons for my decision are sufficiently set forth in my separate opinion in *Kraft Foods v. Moore McCormack Lines, Inc.* (14 SRR 603, 606 (1974)) and *OFC v. Royal Netherlands SS Co.* (Docket No. 72–39, report served January 30, 1975) which I incorporate herein by reference.

Commissioners Ashton C. Barrett and Clarence Morse, dissenting.

We would deny the granting of reparations in these cases for the same reasons expressed in detail earlier in our opinion in *Ocean Freight Consultants, Inc., v. Royal Netherlands Steamship Company* (Docket No. 72–39, Report served January 30, 1975). The legal issue is indistinguishable in each of these cases and should be resolved similarly.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–37

AMF INCORPORATED

v.

AMERICAN PRESIDENT LINES

NOTICE OF ADOPTION OF INITIAL DECISION

Feb 4 1975

The Initial Decision of the Administrative Law Judge in this proceeding was served January 10, 1975. No exceptions have been filed to the Initial Decision. In view of the ultimate decision reached by the Administrative Law Judge, the Commission has determined not to review the Initial Decision denying reparations. Accordingly, notice is hereby given that such Initial Decision became the decision of the Commission on February 10, 1975.

Therefore, it is ordered, That the proceeding is discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74–37

AMF INCORPORATED

v.

AMERICAN PRESIDENT LINES

Reparation denied.

Rauf Bessolt and *Cesar Garcia,* Export Traffic Manager and Manager Purchasing and Transportation International, respectively, of AMF Incorporated for the complainant.

James H. Seymour, for respondent. (*W. H. Williams,* Vice President of respondent, filed Request for Extension of Time to Reply to Complaint).

INITIAL DECISION ON COMPLAINT FOR REPARATION OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was conducted under the Shortened Procedure provided for in Rule 11(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.181. AMF Incorporated (AMF) in its complaint served September 5, 1974, had requested the conducting of the proceeding under the Shortened Procedure. The respondent, American President Lines, Ltd. (APL), in its answer filed October 24, 1974 (the time to reply having been extended to October 25, 1974, by Notice served September 25, 1974), did not respond to the request for use of the shortened procedure. The Presiding Administrative Law Judge, on October 25, 1974, served notice of a prehearing conference to be held December 3, 1974. However, on November 22, 1974, APL filed a letter, dated November 15, 1974, in which it stated agreeableness to the Shortened Procedure and requested dismissal of the prehearing conference. The parties having agreed to the Shortened Procedure, the Presiding Administrative Law Judge, in a notice served November 25, 1974, granted approval of the use of the Shortened

[1] This decision became the decision of the Commission 2/4/75

Procedure, cancelled the prehearing conference and issued the following procedural schedule:

AMF to present facts and arguments within 10 days of the date of the notice; APL to present facts and arguments within 10 days of AMF's service above, and AMF to reply within 10 days of APL's service above.

In an affirmative defense attached to its answer to the complaint, APL stated it had corrected the freight charges payable in the shipments to $29,862.71 and in support attached as Exhibit "A" a corrected copy of the aforesaid bill of lading dated August 31, 1972, and as Exhibit "B" a copy of the record of the deposit on October 10, 1972, of those sums in the bank attributable to the shipments in the amount of $23,161.72 for item bill of lading No. 0053 and $6,700.99 for item bill of lading No. 0023, a total of $29,862.71. On December 11, 1974, AMF filed a letter dated December 3, 1974, signed by its Manager of Purchasing and Transportation International, in which AMF admits that the figure of $29,862.71 is the correct amount paid rather than the $33,352.68 listed by oversight in the complaint. Thus AMF revised the amount sought on reparation from $11,015.37 to $7,525.40. (The said letter also contains AMF's contention that Rule 1e of the tariff in question is discriminatory, and that APL's defense is unreasonable and self-serving.) Therefore, hereinafter the above corrected figures only are used. Besides the above letter, the pleadings filed herein are the complaint, containing arguments, and the answer of APL containing its affirmative defense, on which the record is closed for decision.

FACTS

AMF, a New Jersey corporation, whose principal business is the marketing of various types of sporting goods, machinery and bowling alley flooring, etc., shipped 15 containers and 10 skids of bowling alley flooring, bowling machines and pins, measuring 8,635 cubic feet and 37,912 MBM, weighing 228,129 lbs., on board APL's vessel *President Hayes*. The port of loading was Baltimore/New York. The single bill of lading was numbered for Baltimore as 0053, and for New York as 0023, dated at New York August 31, 1972. The shipment's destination was Naha, Okinawa. The total charged and collected by APL for transportation of the freight was $29,862.71. APL, a common carrier by water engaged in transportation of cargo between the United States Atlantic and Gulf Ports and Far East ports operated under the Far East Conference Tariff No. 25-FMC No. 5, and APL is a member of that conference. AMF alleges that APL's charge of $29,862.71 for transportation of the freight was greater than those in effect in the said

tariff, in violation of section 18(b)(3) of the Shipping Act, 1916. APL denies any such violation.

AMF contends that the correct total freight for the shipment should have been $22.337.31, because the port of discharge was Naha, Okinawa, and APL instead of applying the regular rates as it did, should have applied the special rates provided under tariff items 424 and 1625, and a differential of $6.50 should have been added in special rate rather than regular rate provided for Nagoya, Yokohama, Kobe and Osaka. Further AMF contends that APL failed to give discount for the commodities moved in 15 House to House containers, and refers to tariff rule 21.14, page 120. And, it was in its argument that AMF inserted information about APL having rejected the claim for refund as time-barred and AMF's argument that the tariff rule is self-serving and would defeat the two year statute of limitation in section 22 of the Shipping Act, 1916.

APL specifically denies that an overcharge in the amount of $7,525.40 or any other amount was made with respect to the shipments. In the section of its answer entitled Affirmative Defense, APL states that Rule le of the tariff which APL alleges to be applicable to the shipments provides in effect that "special rates" apply only "to the port for which the special rate is named," and that the rates which AMF claims to be applicable to the shipments are "special rates" which are not named for the destination of shipments, Naha, Okinawa; and that waiver of the Cargo Administration Charge of $3.00 per ton, as provided in Rule 21(B)(14) of the tariff is not permitted because the waiver was permitted only to "Japan ports" and at the time Okinawa, the destination of the shipment, was in control of the United States and was not a "Japan port."

AMF in its December 3, 1974, letter contending that Rule le of the tariff is discriminatory also states that it would be unfair that the carrier charges 118% additional freight on item 1625 just for moving the cargo from a Japanese base port to Okinawa. AMF would also have a comparison of Rule 1 and rates in question, applicable at the time the shipment moved, with Pacific Westbound Conference in support of its contention that port differential rate of $6.50 for Okinawa be added in special rates.

DISCUSSION

AMF, granted the opportunity to present facts and arguments, resorted to comparing Rule 1 of the tariff and rates in question, applicable at the time the shipment moved, with Pacific Westbound Conference tariff, but not indicating thereby that APL violated any provision

of the applicable tariff or of the Shipping Act, 1916. Further AMF cites no authority permitting or requiring that any action be taken by this Commission because of the comparison, lacking any proof of violation of tariff or law by APL.

As to the conflict between the two year statute of limitations provided in section 22 of the Shipping Act, 1916, and a lesser period of time provided in a tariff, it is rather obvious that the Act prevails, but since no violation of the tariff or law has been shown it is not necessary to pursue the matter.

Despite AMF's claim that the defense by APL is unreasonable and self-serving and since there is no apparent need to deal herein with time limitations in a tariff versus the time limitations of the Act or to act after comparing the tariff with that of another conference and in view of APL's reference to the specific applicable section of the tariff used herein, there is no reason given that would preclude the use of the specific tariff section and having those sections prevail over general arguments as to fairness in the absence of proof of any violation of tariff or law by the carrier.

Upon consideration of the record herein, the pleadings and the arguments, it is concluded that AMF has not proved that APL has violated the provisions of the applicable tariff or of the Shipping Act, 1916. Therefore, in addition to the findings and conclusions heretofore stated, it is found and concluded that AMF is not entitled to reparation, and the claim should be denied.

Wherefore, it is ordered that the claim of AMF for reparation, be and hereby is denied.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D. C.,
January 10, 1975.

FEDERAL MARITIME COMMISSION

No. 74–52

McDONNELL DOUGLAS CORPORATION

v.

THE HAPAG-LLOYD NORTH ATLANTIC SERVICE STEAMSHIP COMPANY

NOTICE OF ADOPTION OF INITIAL DECISION

Feb 19 1975

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 19, 1975, with the modification noted hereafter.

On page five of the initial decision the rate of interest to be added in the event of untimely payment of reparation is reduced to six percent, the rate traditionally awarded by this agency.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74–52

MCDONNELL DOUGLAS CORPORATION

v.

THE HAPAG-LLOYD NORTH ATLANTIC SERVICE STEAMSHIP COMPANY

Reparation awarded.

Melvin D. McKinney, Complainant's Manager—Traffic and Transportation, for the complainant.

Francis J. Barry, Senior Vice President-Traffic, United States Navigation, Inc., Agents of the Respondent for the Respondent.

INITIAL DECISION OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE,[1] ON CLAIM FOR REPARATION

This proceeding was conducted under the Shortened Procedure as provided in Rule 11(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.181. The respondent, Hapag-Lloyd North Atlantic Service Steamship Company (Hapag-Lloyd) by and through its Agent, United States Navigation, Inc., first sought to have this matter adjudicated under Subpart S (46 CFR 502.301) Small Claims. However, the claim herein exceeds the $1,000 jurisdictional amount under Small Claims, and the request was denied by notice served December 12, 1974. Hapag-Lloyd on December 20, 1974, filed its answer to the complaint and requested the use of the Shortened Procedure. The complainant, on January 6, 1975, filed its consent thereto. Approval so to proceed was served January 7, 1975, including a procedural schedule granting the parties the right to submit within 10 days of that date any other facts and arguments each may wish to present. In a notice served December 27, 1974, on the request of Hapag-Lloyd to proceed under the shortened procedure, each party

[1]This decision became the decision of the Commission 2/19/75

also had been given 10 days to present any other facts and arguments. No one has presented under either of the above sections any other facts and arguments, so the facts and arguments are as hereinafter indicated.

FACTS

McDonnell Douglas Corporation (McDonnell) a Maryland Corporation, with its principal office in St. Louis, Missouri, in its complaint herein, served December 3, 1974, seeks reparation from Hapag-Lloyd in the amount of $2,303.83, its request for refund of which having been rejected by the respondent. Hapag-Lloyd, in a letter dated December 9, 1974, filed December 11, 1974, confirmed that the declination of the claims was based on North Atlantic Continental Freight Conference No. (29) FMC-4 Rule 8, which requires, *inter alia* the claims for freight charges to be presented within 6 months after date of shipment, adding that similar claims presented within the six-month period had been honored. Hapag-Lloyd in its reply filed December 20, 1974, to the complaint also admits having received McDonnell's claim for $2,303.83 for substantiated overcharges of freight, and again Hapag-Lloyd says the claims were submitted more than six (6) months after shipment and Hapag-Lloyd could not honor such claims as to have done so would have been a violation of the Tariff's((29) FMC 4) Rule 8. Hapag-Lloyd's reply also states that McDonnell's statement of the facts are not disputed and the facts include that Hapag-Lloyd is a common carrier by water engaged in transportation between New York, New York and Bremerhaven, West Germany and is subject to the provisions of the Shipping Act, 1916, as amended.

By bill of lading No. C0015 dated March 30, 1973, issued by Copeland Shipping, Inc., McDonnell shipped on April 2, 1973, on board the vessel *Alster Express* from New York to Bremen, West Germany, 1 container, HLCU4250386, containing 15 skids, pallets, platforms or skids, knocked down, iron or steel, 1,311.6 cubic feet, 9500 pounds. Rated from item 6989112001 of North Atlantic Continental Freight Conference Tariff Number (29) FMC-4 at factor of 32.8000 rate $62.25 charge $2,041.80. Corrected description furnished was, Shipping Rates, Iron or Steel, Used, Returned. Rate should be from item 6922101755 of Tariff at factor of 18.75 rate $42.50 charge $796.87. On January 4, 1974, McDonnell filed claim (74.7 claimant's number) with Hapag-Lloyd for refund of $1,244.93 overcharge.

Bill of lading number C0003 dated May 25, 1973, issued by Copeland Shipping, Inc., McDonnell shipped on May 31, 1973 on board

vessell *Alster Express,* from New York to Bremer, West Germany—1 container, HLCU 2107000 containing 6 units pallets, platform or skids, knocked down, iron or steel, 935.8 cubic feet 4000 pounds. Rated from item 6989112001 of Tariff at factor 23.4000 rate $62.25 charge $1,456.65. Corrected description furnished was, Shipping Racks, Iron or Steel, Used, Returned. Rate should be from Item 6922101755 of Tariff at factor of 12.053 rate $33.00 charge $397.95. On January 4, 1974 McDonnell filed claim (74–8 claimant's number) with Hapag-Lloyd for refund of $1,058.90 overcharge—McDonnell alleges that Copeland Shipping, Inc. has subjected McDonnell to the payment of rates which were when exacted and still are unjust and unreasonable in violation of Section 18 of the Shipping Act, 1916.

Reparation of $2,303.83 is sought.

DISCUSSION

It is clear, and also admitted, that the requests for refunds of $2,303.83, first made of the respondent on January 4, 1974 for overcharges on shipments of freight on April 2, 1973 and May 31, 1973, were made later than six (6) months after shipment. It is admitted that the overcharges are substantiated, but payment of the refund was denied by the respondent who claims that to honor such claims would have been a violation of the North Atlantic Continental Freight Conference Tariff (29), FMC-4, Rule 8's six (6) months statute of limitations. McDonnell filed its complaint herein, December 2, 1974 (served December 3, 1974), well within the two (2) year statute of limitations provided in Section 22 of the Shipping Act, 1916.

Under the circumstances of the instant case, the Commission's ruling must prevail that a conference rule providing that claims for adjustment of freight charges must be presented within six (6) months after shipment date, cannot bar recovery in a complaint case brought under Section 22 of the Act. *Minnesota Mining and Manufacturing Company v. American Export Isbrandtsen Lines, Inc.* 12 FMC 11 (1968); *United States of America v. American Export Isbrandtsen Lines, Inc.*, 11 FMC 298 (1968); *Kraft Foods v. Prudential Grace Lines,* 16 FMC 405 (1973).

Upon consideration of the record herein, the pleadings and the arguments, it is concluded that McDonnell is entitled to an award of reparation in the amount of $2,303.83. Therefore in addition to the findings and conclusions heretofore stated, it is *found* and *concluded:*

(1) Reparation should be awarded to McDonnell.

(2) Hapag-Lloyd collected from McDonnell the sum of $2,303.83 more than was properly due for the services rendered in the transpor-

tation of complainant's freight, and in violation of Section 18(b)(3) of the Shipping Act, 1916.

(3) McDonnell is entitled to and is hereby awarded as full reparation the amount of $2,303.83 with interest at the rate of seven (7) percent per annum to be added if the reparation is not paid within 30 days.

Wherefore, it is ordered,

(A) McDonnell be and hereby is awarded reparation in the amount of $2,303.83 from Hapag-Lloyd.

(B) Hapag-Lloyd is hereby directed to make such payment within 30 days after the Commission's final decision herein. To the said amount the respondent shall add interest at seven (7) percent per annum for the time (if any) elapsing between the date hereinabove set for payment and payment of the actual sum of $2,303.83.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
January 20, 1975.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 314(I)

WILLIAM K. MAK,
d/b/a GENERAL COMMODITIES COMPANY

v.

THOR ECKERT & CO., INC., GENERAL AGENT
FOR ORIENTAL OVERSEAS LINES

NOTICE OF DETERMINATION NOT TO REVIEW

Mar 6 1975

Notice is hereby given that the Commission on March 7, 1975 determined not to review the decision of the Settlement Officer in this proceeding served February 25, 1975. By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

INFORMAL DOCKET NO. 314(I)

WILLIAM K. MAK,
d/b/a GENERAL COMMODITIES COMPANY

v.

THOR ECKERT & CO., INC., GENERAL AGENT
FOR ORIENTAL OVERSEAS LINES

Reparation denied.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER [1]

This informal complaint alleges that unwarranted storage charges were assessed against the complainant because of respondent's delay in sending an arrival notice. Violations of sections 17, 18(a), and 18(b)(2) of the Shipping Act, 1916, are alleged and reparation in the amount of $80.28 plus 6% interest from the date of payment is sought.

Complainant is an importer of foodstuffs from the Far East to the United States. Respondent is a common carrier by water between Far East and United States Atlantic ports. Involved is a shipment of three hundred cartons of bamboo shoots loaded at Keelung, Taiwan, and carried to Baltimore on the respondent's vessel, the *Oriental Warrior*. The bill of lading dated September 24, 1971, is marked "freight collect at destination." The shipment was scheduled to arrive at Baltimore in November. However, due to a dock strike in Baltimore at that time, the cargo was diverted to Charleston, South Carolina. The *Oriental Warrior* arrived there November 8. The respondent, it is alleged, delayed giving notice of the ship's arrival to the complainant until January 5, 1972, a lapse of fifty-seven days. The January 5 notice, which is erroneously dated 1971, is the only one that appears in the attachments to the complaint. However, the statement, "As per notifi-

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

cation originally dispatched, the vessel discharged at Columbus Street Terminal . . .", appears in that notice. Respondent counters that arrival notices were sent seasonably by regular mail to all consignees, and offers as evidence thereof a printed copy of the arrival notice. That notice states the *Oriental Warrior* arrived at Charleston on November 8, 1971, was discharged November 13, and is dated November 18.

Procedurally, section 22 of the Shipping Act, 1916, 46 U.S.C. 821, requires that complaints must be filed within two years from the time the cause of action accrues in order to enter an award of reparation.[2] The cause of action accrues only when the freight is paid.[3] A cause of action accrues at the time of shipment or payment of the freight, whichever is later.[4] The complaint states the freight was paid January 14, 1972, and this is not disputed by the respondent. Hence the complaint filed January 2, 1974, was within limitations.

Substantively, the only precedent appears to be *Joseph and Sibyl James v. South Atlantic & Caribbean Line, Inc.*, Informal Docket No. 99(I), 14 F.M.C. 300 (1970). There the consignee/complainants received both the bill of lading and an invoice. The invoice, in English, had no entry after "arrival date." The bill of lading, which also was in English, bore an arrival notice in Spanish stamped faintly on the bottom corner and barely legible. This was determined to be an unreasonable practice in violation of section 18(a) of the Shipping Act, in that it failed to give adequate notice to consignee/complainants of the arrival of their shipment. Adequacy of notice therefore depends on reasonableness under the circumstances. The circumstances surrounding the tender of the arrival notice in this instance are supportive of a finding of its adequacy or reasonableness. As noted before, the *Oriental Warrior* arrived at Charleston on November 8, 1971, was discharged November 13, and the arrival notice was sent November 18. Complainant contends the January 5, 1972, letter is the first notice it received. Again, as noted before, that notice referred to "notification originally dispatched." This is corroborative of the respondent's contention that notice was mailed on November 18, 1971. Therefore there is no showing of unjustness or unreasonableness in any regulation or practice of the respondent which would be violative of section 17 of the Shipping Act, 1916.

Section 18(a) of the Shipping Act, 1916, is inapplicable as it applies to interstate commerce.

There is no showing of a change in charges in violation of section 18(b)(2) of the Shipping Act, 1916, because the bill of lading expressly

[2] *Reliance Motor Car Co. v. G.L.T.C.*, 1 U.S.M.C. 794, 797 (1938).
[3] *Aleutian Homes, Inc. v. Coastwise Line et al.*, 5 F.M.B. 602, 611 (1959).
[4] *Rohm & Haas Co. v. Seatrain Lines, Inc.*, Docket No. 73-51, Order 10/16/73.

provides for the assessment of additional costs where a deviation from an anticipated route is required.[5]

Accordingly, the request for reparation is denied.

(S) JAMES S. ONETO,
Settlement Officer.

[5] *C. H. Leavell & Company v. Hellenic Lines, Limited*, 13 F.M.C. 76, 85 (1969). See also *Overseas Freight and Terminal Corp. (All Cargo Line)—Extra Charges Due to Delay in Unloading Caused by Longshoremen Strike*, 8 F.M.C. 435, 445 (1965).

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–36

ABBOTT LABORATORIES

v.

UNITED STATES LINES, INC.

Respondent's adherence to a tarriff rule which precludes its consideration of a claim for adjustment of freight charges not presented in writing to respondent within six months of date of shipment does not foreclose complainant's remedy before this Commission.

Reparation denied on the basis of complainant's failure to sustain its burden of proof to substantiate its claim.

R. W. Puder for complainant Abbott Laboratories.

Russel Weil and *James P. Moore* for respondent United States Lines, Inc.

REPORT

Decided Mar 18 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman*)

This proceeding was initiated by complaint of Abbott Laboratories (Abbott) against United States Lines, Inc. (USL), alleging that on six separate shipments of complainant's cargo on respondent's vessels from Baltimore, Maryland, to London, England, respondent had assessed improper freight rates in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act). As a result of these alleged erroneous assessments, complainant seeks reparation in a total sum of $402.74.

Administrative Law Judge James Francis Reilly issued his Initial Decision in which he concluded that complainant had substantiated its claim and was, accordingly, entitled to reparation in the amount sought. The proceeding is now before us on our own motion to review Judge Reilly's Initial Decision.

FACTS

Complainant Abbott Laboratories is an Illinois corporation engaged in the manufacture and distribution of certain chemicals, drugs, medicines, pharmaceuticals and related products.

Respondent USL is a common carrier by water operating a liner service between North Atlantic ports of the United States and ports in England, Scotland, Wales, Northern Ireland and the Republic of Ireland. USL serves this trade as a member of the North Atlantic United Kingdom Freight Conference (Conference) and is therefore bound to observe the provisions of that conference tariff (Tariff No. (47) FMC-2) in effect and on file with the Commission.

As noted above, Abbott filed its complaint alleging that USL had assessed a rate on certain cargoes higher than that properly applicable. More specifically, Abbott claimed that USL had erroneously applied its Cargo, N.O.S. rate to six shipments of "Intravenous Solution Sets",[1] all transported during the period June 23, 1971 through September 18, 1971. Abbott claimed that the proper rate to have been applied was, rather, that applicable to "Sets, Parenteral Administration, Empty" [2] and that by its failure to assess this latter rate, USL had overcharged Abbott by $402.74.

Abbott initially filed these claims with USL through Abbott's agent, Ocean Freight Consultants, Inc., on November 1, 1972 (five claims) and November 3, 1972 (one claim). These claims were all rejected by USL on the basis of its Tariff Rule 22. That rule provides, in pertinent part:

> All . . . claims [other than those based on alleged errors in weight or measurement] for adjustment of freight charges must be presented to the Carrier in writing within six (6) months after date of shipment.[3]

In its argument before the Administrative Law Judge, however, USL did not rely merely on the six-month limitation on claims. In its memorandum, USL raised two further issues in its defense. USL stated that the weight and measure entries on the various bills of lading involved here disclose widely varying weights and measures, although the cargoes are uniformly described as intravenous solution sets. While USL admits that some were cartons and others "bundles", even similarly packaged items varied considerably in their characteristics. "Cartons" varied from an average weight of 17.5 pounds per carton to 25.8 pounds per carton. Cubic foot measures were equally diverse.

[1] The description appearing uniformly on all applicable bills of lading.

[2] Item No. 8060, 2nd rev. page 174 (effective date 2/11/71), and 3rd rev. page 174 (effective date 9/1/71), North Atlantic United Kingdom Freight Conference Tariff No. (47) FMC-2.

[3] North Atlantic United Kingdom Freight Conference Tariff No. (47) FMC-2, Rule 22(a), page 21.

USL cites this lack of correlation as to weights and measures as a factor which:

> . . . makes one wonder . . . whether they were, in fact, empty as now claimed, whether they included solution bottles, whether they might be covered by [another] tariff item . . . , etc.

USL maintains that these inconsistencies must be resolved by complainant in order to sustain its contention that these items were in fact, "Sets, Parenteral Administration, *Empty*" (emphasis added). In further support of this position, USL relies on its Tariff Rule 12 and on this Commission's own rules. USL maintains that since the description of the goods on the bill of lading does not match any published commodity rate, its Rule 12 of the tariff must apply. That rule states:

> All cargo not specifically listed in the tariff and which is not dangerous . . . , will be assessed the General Cargo rate.

Additionally, the Commission's own General Order 13 (46 CFR 536.5(i)) is cited for its provision that:

> When commodity rates are established, the description of the commodity must be specific. Rates may not be applied to analogous articles.

DISCUSSION AND CONCLUSION

In his initial decision, Judge Reilly awarded reparation, concluding that Abbott had sustained its case by showing that what it described as Intravenous Solution Sets were in fact Empty Parenteral Administration Sets. This conclusion was based, apparently, upon the Random House dictionary definition of "parenteral" as:

> 1. Taken into the body in a manner other than through the digestive canal. 2. Not within the intestine; not intestinal.

We are not completely persuaded by complainant's proffered proof that the cargo was, in fact, empty parenteral administration sets and therefore should have been rated as such. While we may concede that, in general, a parenteral administration set is the same device as an intravenous solution set, we are not willing to concede that the sets in question here have been proven to have been empty. The variations in weight, measurement and other packing characteristics do, in fact, raise serious questions as to the actual contents of these shipments. These questions have not been satisfactorily resolved by complainant; it was incumbent upon complainant to have resolved such questions. It seems apparent to us that any given quantities of an identical item would be of uniform average weight. Deviations of the sort here shown on the various bills of lading raise serious doubts that these

items shipped were all identical—that is, empty parenteral administration sets. We have consistently demanded in cases such as this that complainant meet a heavy burden of proof. Complainant here has failed to do so.

We are constrained to emphasize that this case does not fall within the scope of our recent decisions in *Kraft Foods v. Moore McCormack Lines,* Docket No. 73–44, decision served March 24, 1974, and its progeny. Cases such as *Kraft* involve sustaining a carrier's reliance on a reasonable, well-grounded tariff rule which would preclude consideration of overcharge claims based on alleged errors in weights or measurements filed after the cargo has left the custody of the carrier. This case does not involve such a claim. This case involves a misdescription of goods only, or, rather, an inadequate description of goods. We do not here permit the carrier to rely on a six-month time limit imposed by its applicable tariff on such claims. We here decide only that complainant, on the record, has not adequately resolved our doubts as to the nature of the cargo and therefore respondent was justified in applying the general cargo rate to the inadequately described commodities. Reparation denied.

Commissioner George H. Hearn, concurring:

I concur in the denial of reparation on the basis that the complainant failed to meet the burden of proof.

There is need for further comment, however, because of the relationship of this case to *Kraft Foods v. Moore McCormack Lines, Inc.* (14 SRR 603 (1974) Petition for Reconsideration denied December 13, 1974) and *OFC v. Royal Netherlands SS Co.* (Docket No. 72–39, Decision Served January 30, 1975).

In this case the majority fails to adhere to the guidelines it set forth in those cases. Here USL based its defense in part on a tariff rule which meets the standard of the majority *Kraft* decision; and although the present rule does not involve a trade name description, it is indistinguishable from the type of rule considered acceptable by the majority in *Royal Netherlands.*[4]

The separate opinions of the Chairman and Vice Chairman Day and of Commissioner Barrett and Commissioner Morse, through different reasoning, both base their conclusion on the failure of complainant to meet the burden of proving what was actually shipped, and the majority therein constituted is inconsistent with its views in *Kraft* and *Royal Netherlands.* The reasoning of the combined

[4]Commissioners Barrett and Morse differed with Chairman Bentley and Commissioner Day only as to the clarity of the rule but they all agreed as to the substantive effect of the rule.

majority view in those cases is not carried to its logical conclusion.

Given the cargo description in the bill of lading, USL should be bound to implement its rule requiring application of the General Cargo rate. The majority view in *Kraft* and *Royal Netherlands* does not require the carrier to look further than the bill of lading for the "proper" cargo description; and the tariff rule here applies to *"All* cargo not *specifically* listed in the tariff". It does not provide an exception for *some* cargo "almost exactly" listed in the tariff, as the majority applies the rule.

With this distinction now being created by the majority among tariff rules, the result of the line of decisions beginning with *Kraft* is confusion as to when certain tariff rules will be allowed as a complete defense. The situation regarding overcharge claims will now certainly be clouded by the difficulties, uncertainties and inconsistencies which I found to be the outgrowth of the majority *Kraft* decision.[5]

Consequently, I concur in the denial of reparation and find the result consistent with my views in *Kraft* and *Royal Netherlands.*

Commissioners Ashton C. Barrett and Clarence Morse, concurring and dissenting.

In his Initial Decision, Administrative Law Judge Reilly awarded reparation, concluding that Abbott had sustained its case by showing that what it described as "Intravenous Solution Sets" was in fact "Sets, Parenteral Administration, Empty". This conclusion was based, apparently, upon the Random House dictionary definition of "parenteral" as:

1. Taken into the body in a manner other than through the digestive canal.
2. Not within the intestine; not intestinal.

We view this matter differently.

Tariff Rule 12 states that "All cargo not specifically listed in the tariff and which is not dangerous . . . , will be assessed the General Cargo rate." Hence, under the principles announced in *Kraft Foods v. Moore McCormack Lines, Inc.*, Docket No. 73–44, served March 26, 1974, 14 SRR 603, rehearing denied, December 13, 1974, the General Cargo rate must be applied unless the bill of lading description of the commodity shipped fits the commodity rate description.[6]

Here, there is no tariff commodity description for "Intravenous

[5] 14 SRR 603, 606.

[6] This is not a claim based on a controlling tariff rule such as that discussed in *Kraft* covering claims for asserted freight overcharge based on alleged errors in weight or measurement. Rather, this is a case where there is no controlling tariff rule but one which involves only the question whether the shipper's description of the commodity adequately conformed to the tariff commodity description.

Solution Sets". Therefore, the issue is whether the bill of lading description "Intravenous Solution Sets" meets the tariff commodity description "Sets, Parenteral Administration, Empty". We conclude it does not. The bill of lading description is deficient not only in failing to indicate that the shipment consisted of "empty" sets [7], but it was deficient in failing to describe the shipment as "Sets, Parenteral Administration" as well. We need look no further.

As indicated in *Kraft* and subsequent cases, Tariff Rule 12 is the "legal" rule applicable to this matter and may not be ignored, nor may it be held to be unlawful absent a finding of unlawfulness in a proper proceeding. 5 U.S.C. 551 et seq. The rule is not inherently or "patently" unlawful.[8] The rule constitutes a reasonable and lawful attempt on the part of common carriers to assure that shippers declare their shipments with such degree of particularity as necessary to enable a rating clerk to properly rate the shipments according to tariff commodity description and without need to resort to specialists, technical dictionaries, or the like. The shipper is the expert in terminology with regard to this product, and is charged with knowledge of the tariff rates, rules, and regulations. It should be a simple task for the shipper, or its ocean freight forwarder, knowing the tariff commodity descriptions and the true nature of the commodity shipped, to align its description of the commodity to the tariff commodity description. We do not require that only the verbatim tariff commodity description, without any deviation or omission, is acceptable to avoid application of the General Cargo rate under Tariff Rule 12. We do require, however, that within a zone of reasonableness the commodity description given by the shipper be sufficiently precise and synonymous with the tariff commodity description as to clearly and unqualifiedly disclose to the rating clerk that the shipper-given description can only be read to mean a commodity item as defined in the tariff, without necessity of resorting to specialists, technical dictionaries, or the like. Our views are fortified by our own General Order 13, 46 CFR 536.5(i), which provides:

(i) When commodity rates are established, the description of the commodity must be specific. Rates may not be applied to analogous articles.

We conclude, therefore, that the shipper failed to describe the shipment in the particularity required by the tariff, and the carrier

[7] Even if we accepted complainant's contentions, which we do not, the variations in weight, measurement, and other packing characteristics raise serious doubts that these items shipped were all identical empty parenteral administration sets.

[8] See *Municipal Light Board of Reading & Wakefield, Mass. v. Federal Power Commission*, 450 F.2d 1341 (D.C. Cir. 1971). See also our concurring and dissenting opinion in *Economics Laboratory, Inc. v. Prudential Grace Lines*, Informal Docket No. 301(F), served March 20, 1975.

was obligated to assess the General Cargo rate under Tariff Rule 12.[9]

Because of our resolution of this matter, we find it unnecessary to discuss the issue raised by Answer, whether in a "freight collect" bill of lading the proper parties complainant have been named. See *Southern Pac. Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918); *Colgate Palmolive Co. v. Grace Line, Inc.*, FMC Informal Docket No. 127(I), 11 SRR 982 (1970).

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[9]This case is but one example of inadequacy in the shipper's documentation. Since a large proportion of our exports are handled by ocean freight forwarders who profess to be experts in this field, we believe such instances of inadequacies might be reduced or eliminated if ocean freight forwarders were to be held responsible for the proper preparation of documents, to the end that the shipper receives the proper and lowest tariff rate. In *Equality Plastics, Inc., et al.*, FMC Docket No. 71-94, November 29, 1973, 14 SRR 217, 228, we stated:

"We are persuaded that an investigation should be instituted to determine the feasibility of establishing a general standard of conduct for persons in the situation of Leading; a standard heretofore lacking."

This the Commission has failed to do, and we renew our request that such investigation be initiated.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 301(F)

ECONOMICS LABORATORY, INCORPORATED

v.

PRUDENTIAL-GRACE LINES

Reparation denied.

M. E. Parker for Complainant.
A. R. Maio for Respondent.

ADOPTION OF INITIAL DECISION

Mar 18 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman*)

This proceeding was initiated as a result of a complaint filed by Economics Laboratory, Inc. (ELI), alleging that Prudential-Grace Line (Grace) subjected it to the payment of an overcharge with respect to a shipment of chemical products from New York, New York, to Santo Domingo, Dominican Republic, for which ELI seeks reparation in the amount of $227.59, plus interest. While this proceeding was originally assigned to a settlement officer pursuant to the Commission's informal procedure, Grace subsequently notified the Commission that it did not consent to such procedure but rather elected to have this proceeding adjudicated under the formal procedure for small claims. Administrative Law Judge Norman D. Kline issued his Initial Decision denying reparation. The proceeding is now before the Commission upon its own motion to review.

FACTS

Respondent, Grace, transported the cargo at issue from New York, New York, to Santo Domingo on its vessel SANTA MARIANA, under bill of lading dated September 23, 1971, and in accordance with the terms of United States Atlantic and Gulf/Santo Domingo Conference Freight Tariff, FMC No. 1. The shipment involved was described on the bill of lading as "75 drums, Industrial Chemical Products", to which Grace applied its tariff rate of $49.00 per 40 cubic feet, the rate applicable to "Chemicals, N.O.S." [1]

Complainant alleges that the cargo actually shipped was a product known as "Briteklenz" (allegedly not a trade name), which is a type of detergent alkylate. Therefore, ELI contends that the rate which should have been applied was that applicable to "Detergent Alkylate", which is $38.00 per 2,000 pounds.[2] As a result of this alleged overcharge, ELI seeks reparation in the amount of $227.59.

In denying that an improper rate was charged, Respondent argues that the rate applicable to the goods as described on the bill of lading was that assessed. Without providing any further description of the goods shipped, Grace also contends that it would be an undue burden upon the carrier to force it to inquire on each shipment whether or not the bill of lading description were accurate. Grace maintains that in any event, it had no reason to believe the shipper had not correctly described the goods involved. Finally, Grace insists that the action taken was fully consistent with its conference tariff rule which provides:

> Bills of lading describing articles by trade names are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise description appearing herein. Bills of lading reflecting only trade name will be automatically subject to the application of the rate specified herein for Cargo NOS as minimum.[3]

Notwithstanding the defenses provided by Grace, Complainant has sought to show the actual character of the product shipped by submitting documents describing it. In support, ELI has submitted its consular declaration in which the product was described as "Briteklenz HC-20" and an advertisement describing "HC-20 Briteklenz" as a "heavy duty alkaline cleaner . . . compounded with sodium hydroxide, an alkaline stable defoamer, and water conditioning agents." ELI further refers to chemical dictionary definitions of "Alkylate" [4] and "de-

[1] United States Atlantic and Gulf/Santo Domingo Conference Freight Tariff, FMC No. 1, 6th rev. page 45; 2nd rev. page 36, Class No. 8.

[2] *Id.*, 11th rev. page 49; 2nd rev. page 36, Class No. 11w (applicable at the time of shipment).

[3] *Id.*, page 7, Item 3(m).

[4] "Alkylate. Generic term, particularly in the oil industry, applied to the product of an alkylation process. (See 'Alkylation Process, HF,' alkylation process, sulfuric acid.) Alkylate generally is blended in varying proportions with other hydrocarbon mixtures also boiling in the gasoline boiling ranges to produce military and civilian aviation gasolines and motor fuels of commerce. (See also detergent alkylate.)"

tergent alkylate",[5] alleging that these show the character of "Briteklenz" as detergent alkylate to which there should have been assessed the tariff rate applicable to detergent alkylate.

THE INITIAL DECISION

In his Initial Decision, Judge Kline denied reparation on the grounds that Complainant failed to sustain its heavy burden of proving that:

> A commodity described on respondent's bill of lading as "Industrial Chemical Products" was in fact "Detergent Alkylate" which should have been rated as such instead of "Chemicals N.O.S."

Characterizing the principal issue herein as,

> . . . whether the Chemical product which comprised the shipment in question consisted in fact of "Detergent Alkylate" so as to qualify for the specific commodity rate published in respondent's tariff under that designation . . . ,

Judge Kline first discusses the documents offered by ELI to support its claim. In so doing, he notes that the manufacturer's advertising claims describe this product as an "alkaline cleaner", while ELI attempted to show this as a detergent alkylate. While conceding that this product may well be shown to be an "alkaline cleaner", Judge Kline finds that alkaline "bears no resemblance to . . . 'alkylates' ", citing Van Nostrand's Chemist's Dictionary.[6] As a result, Judge Kline holds that if "Briteklenz" were in fact a product of the alkylation process (see footnotes 4 and 5), the fact is nowhere shown in the supporting documents of ELI and therefore concludes that even if it is assumed that Briteklenz is in fact a detergent, there is nothing to show that it is a detergent alkylate, i.e. a detergent made through an alkylation process.

In denying ELI's claim for reparation, Judge Kline further explains that:

> Even if complainant had clearly proved its case, there are other factors which cast doubt on the validity of the claim. The rate which complainant was assessed, $49 per 40 cubic feet, was published in respondent's tariff applicable to "Chemicals, viz. N.O.S. Non-Hazardous, actual value not over $300 per freight ton." United States Atlantic & Gulf-Santo Domingo Conference, Freight Tariff F.M.C. No. 1, 6th rev. page 45; 2nd rev. page 36, Class No. 8. That item, however, contained a rule requiring the shipper to furnish

[5] "Detergent alkylate. Generic term, particularly in the soap industry, applied to the reaction product of benzene or its homologs with a long-chain olefin (such as propylene trimer or tetramer) to produce an intermediate (see, for example, dodecylbenzene) used in the manufacture of detergents. Also refers to an alkylate made from a long-chain normal paraffin which is treated (by chlorination) to permit combination with the benzene to produce a biodegradable or 'soft' alkylate."

[6] Van Nostrand's Chemist's Dictionary (1953 Ed.) defines alkaline as "Exhibiting some or all of the properties of an alkali. . . ." It further defines alkali as:

> A term that was originally applied to the hydroxides and carbonates of sodium and potassium but since has been extended to include the hydroxides and carbonates of other alkali metals and ammonium.

a specific description of the chemicals being shipped on the bill of lading, failing which a "Cargo N.O.S." rate ($75 W/M) was supposed to be assessed. For some reason respondent failed to apply its own rule. It would appear, therefore, that complainant, who is now asking for a rate of $38 per 2,000 lbs., was actually assessed a rate of $49 per 40 cubic feet but probably should have paid $75 W/M, according to the tariff rule.

DISCUSSION AND CONCLUSION

We have undertaken to review the Initial Decision in this proceeding in order to ascertain what impact, if any, our recent decision in *Kraft Foods v. Moore McCormack Lines, Inc.* (Docket No. 73–44, report issued March 26, 1974), may have upon its outcome. We conclude that this is not a case which falls within the purposely limited scope of *Kraft Foods.* In *Kraft* we determined that in cases of disputed weights or measurements brought to the attention of the carrier after the cargo had left his possession, the carrier was justified in refusing to honor a reparation claim, provided his effective tariff contained a rule so stating. As can be seen clearly, the instant proceeding does not fall within that narrow range. As a result, we take this opportunity to restrict *Kraft* to those limits and to make clear that the *Kraft* "rule" does not extend to cases such as this presently before us.

The decision of the Administrative Law Judge is hereby adopted as our decision in this case.

Commissioner George H. Hearn, concurring and dissenting:

I concur in the denial of reparation in this case, but I dissent from the reasoning of Chairman Bentley and Commissioner Day.

The reasons therefore are set forth in my separate opinion in *Kraft Foods v. Moore McCormack Lines, Inc.* (14 SRR 603, 606 (1974)) and *OFC v. Royal Netherlands SS Co.* (Docket No. 72–39, report served January 30, 1975) which I incorporate herein by reference.

In this case, however, I must make some further comment as a result of the apparent failure of Prudential-Grace to follow its tariff and in response to the opinion of Commissioners Barrett and Morse.

I am somewhat of a mind to agree with Commissioners Barrett and Morse in their recommendation to remand this proceeding. I am, however, pursuaded otherwise by several factors.

First, they would remand the "issue whether Tariff Item 105(b) . . . is lawful under the Shipping Act, 1916." This should be unnecessary not only for Commissioners Barrett and Morse but also for Chairman Bentley and Vice Chairman Day. The Barrett/Morse opinion cites *Proposed Rule—Time Limit on Filing Overcharge Claims,* 12

F.M.C. 298 (1969). I believe the majority decision [7] there goes further than the Barrett/Morse opinion admits. That decision should support their view not only as to weight/measurement claims, but also as to cargo description claims.[8]

The majority view there taken with that in *Kraft* should lead the majority to conclude in this proceeding that Tariff Item 105(b) is valid (putting aside for the moment the use of the word "may"). Otherwise, the majority is not being consistent.

Second, the Barrett/Morse opinion relies on *P.P.G. Industries, Inc. v. Royal Netherlands SS Co.* (Informal Docket No. 290(I), Order on Remand, May 16, 1974) for a remand here on use of the word "may" in Tariff Item 105(b). In Docket No. 290(I) I concurred in the remand but did not accept the majority's reasoning.[9] Since then, however, the Commission has issued its decision in Docket No. 72–39, the *Royal Netherlands* case, *supra;* and it appears that there is no real dispute among my fellow Commissioners as to the effect of the tariff rules involved, but only as to acceptable wording: whether or not to accept "as minimum" [10] or to accept "may".

Consequently, in view of my position as stated in *Kraft* and Docket No. 72–39, I see no point in further delaying the outcome of this proceeding. No matter which way this matter might be resolved on remand, reparation will be denied—because Tariff Item 105(b) is proper here, or because "as minimum" is or is not acceptable, or because claimant has not met its burden of proof.

Furthermore, in the Order of Remand in Docket No. 290(I), the majority said as to the use of the word "may":

> . . . we will not, in the future, permit reliance upon such discretionary "rules" as here presented.

I believe it is best to deny reparation here on the present record and wait for a "better" case to test the real but underlying issue, i.e., whether an overcharge claim should be denied, *ipso facto,* based upon a trade-name tariff rule "acceptable" to all my fellow Commissioners. The result in this case will not be altered by further evidence gained on remand, and there is sufficient precedent established by the majority to apply their views to the tariff rules involved here.[11]

[7] I dissented from that decision, concurring only in the lawfulness of the 6-month rule to the extent it is not used to prevent the shipper from availing itself of the 2-year period provided in section 22.

[8] 12 F.M.C. 298, 313–314 (1969).

[9] See Minutes of Commission Special Meeting, May 13, 1974.

[10] These words were at issue in Docket No. 72–39 and also appear in the tariff involved in this proceeding.

[11] The Barrett/Morse opinion would remand also to determine whether claimant submitted its claim to the carrier in accordance with Tariff Item 105(b). This is also unnecessary because, as I have shown, the majority should to be consistent uphold that tariff item and a determination that it was not complied with is not requisite to a denial of reparation.

In *Kraft* I made the following comment in my dissenting opinion:

> Further, If the carrier wishes to collect an undercharge from the shipper for cargo allegedly under-measured, the majority decision provides no answer to the question of whether the shipper may plead the same defense as the carrier in overcharge cases.

There apparently is now an answer: No.

I agree that Prudential-Grace erroneously charged the Chemical N.O.S. rate rather than the higher Cargo N.O.S. rate in the first instance.

The majority would apparently say, however, that the carrier must comply with section 18(b)(3) by collecting undercharges but need not comply with section 18(b)(3) to refund overcharges. Thus, in this case even if the cargo was in fact a "Detergent Alkylate" as alleged by claimant, overcharges could not be recovered because of the failure of claimant to properly follow the tariff rules relative to preparation of bills of lading or perhaps to submission of claims; but the carrier could collect undercharges although it failed to follow its tariff rule concerning application of the Cargo N.O.S. rate. This hardly seems to be an equal application of the law. The carrier can recover despite its own failure to adhere to its tariff, but the shipper cannot recover despite its ability to prove that the carrier collected more than the rate specified for the cargo proven to have been shipped. If that was the intention of Congress in enacting section 18(b)(3), then the often repeated legislative, regulatory and judicial affirmations of the fairness permeating our shipping laws are a sham. Either both the shipper and carrier should be able to recover, or neither; and in my view both should.

In this case I would affirm the decision of the Administrative Law Judge based upon my dissent in *Kraft* and *Royal Netherlands* (Docket No. 72–39). I conclude that the claimant has not met the burden of proving his case and, in fact, was undercharged. Under the law prior to the *Kraft* case, the carrier would, therefore, be bound to seek collection of the undercharges; and concomitantly, the shipper were he able to meet the burden of proof required, could be awarded reparation.

In this case the carrier should pursue collection of undercharges and should be held accountable in the event of a failure to do so.

Commissioners Ashton C. Barrett and Clarence Morse, concurring and dissenting.

In reaching his conclusions, the Administrative Law Judge relied on decisions issued prior to our issuance of *Kraft, supra,* which decision we incorporate by reference.

Because of our resolution of the proceeding, *infra*. we find it unnecessary to resolve either the factual issue in the trade-name area apparently relied on by Prudential-Grace or the burden-of-proof issue relied on by the "majority".

United States Atlantic & Gulf-Santo Domingo Conference's Freight Tariff F.M.C. No. 1, Item 105(b), 10th revised page 13, effective October 5, 1970, provides in pertinent part:

> . . . Adjustment of freight based on alleged error in weight, measurement, or description may be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found.

Neither the parties, nor the Administrative Law Judge, nor the other Commissioners referred to Tariff Item 105(b). We believe, however, that the Commission must take official notice of duly filed tariffs.[12] Tariffs have the force of law,[13] and must be strictly adhered to by carriers and shippers alike, unless the Commission determines in an appropriate proceeding that the tariffs violate the Shipping Act.

A tariff rule similar to Item 105(b) was discussed and approved on March 16, 1974, in *Kraft, supra*, with reference to a claim alleging errors in measurements. And substantially identical rules were also discussed in *Proposed Rule—Time Limit on Filing Overcharge Claims*, 12 F.M.C. 298, 313–314 (1969), a rulemaking proceeding, where we said:

> . . . The carriers' efforts to protect themselves against such claims cannot on the basis of the record in this proceeding be said to be unreasonable.

We have not had here an appropriate proceeding to test the lawfulness of Tariff Item 105(b).[14] Appropriate proceeding requires notice, opportunity to be heard, and evidence which supports a finding of unlawfulness. Administrative Procedure Act, 5 U.S.C. 551 et seq. We would remand to the Administrative Law Judge the specific issue whether Tariff Item 105(b), which restricts adjustments of freight based on alleged error in "description" unless ap-

[12] It is our duty in all proceedings to develop a full and complete record. *Isbrandtsen Co., Inc. v. United States*, 96 F.Supp 883 at 892 (1951), *aff'd per curiam*, 342 U.S. 950.

[13] *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Louisville & Nashville Ry Co. v. Maxwell*, 237 U.S. 94, 97 (1915); *Chicago, B.&O.R. Co. v. Ready Mixed Concrete*, 487 F.2d 1263, 1268 (8 Cir. 1973); *Cincinnati, N.O.&T.P. Ry. Co. v. Chesapeake & O. Ry. Co.*, 441 F.2d 483, 488 (4 Cir. 1971); *Silent Sioux Corp. v. Chicago & N.W. Ry. Co.*, 262 F.2d 474, 475 (8 Cir. 1959).

[14] We disapprove of the use of the word "may" instead of the word "shall" in this tariff item. In *P.P.G. Industries, Inc. v. Royal Netherlands Steamship Co.*, Informal Docket No. 290(I), under similar tariff language, on May 16, 1974, we referred the matter back to the Settlement Officer to determine whether the carriers treated all claimants alike under such an imprecise phrasing. We would do the same here.

plication is submitted in writing in the manner and time specified in Tariff Item 105(b), is lawful under the Shipping Act, 1916. We would also remand to the Administrative Law Judge the issue whether in fact applicant submitted a written claim within the time frame specified in said tariff item. Unless we find a tariff rule unlawful, we are obliged to require compliance with it. *Louisville & Nashville Ry Co. v. Maxwell, supra. Kraft Foods v. Royal Netherlands Steamship Co., supra.*

The tariff herein was filed pursuant to an agreement approved under section 15 of the Shipping Act, 1916.[15] A literal reading of section 15 as it provided prior to 1961 would have required that an agreement among members of a conference adopting tariff rates, rules, and regulations receive section 15 approval. Having early realized that approval of *every* tariff change would be administratively unworkable, the Commission interpreted section 15 not to include "routine" tariff changes in the requirements of that section. *Ex Parte 4—Section 15 Inquiry,* 1 U.S.S.B. 121, 125 (1927). The *Ex Parte 4* interpretation received court approval in *Empire State Highway v. FMB,* 291 F.2d 336, 339 (CA DC, 1961) and Congressional approval in 1961 when the Congress in amending section 15 specifically incorporated an exemption.[16]

Nevertheless, the basic principles still apply and, unless patently unlawful, tariff rates, rules, and regulations filed under an approved section 15 agreement may not be disapproved or rejected without a hearing. 46 U.S.C. 814 and 5 U.S.C. 551 et seq.

Whether a tariff rate, rule, or regulation is in violation of any provision of the Shipping Act, 1916, is a question of fact which requires proper notice, an opportunity to be heard, and evidence which supports a finding of unlawfulness. The Bentley/Day opinion appears to bypass these requirements.

We agree with the view of the Administrative Law Judge, shared in by the other Commissioners, that the rate which complainant was assessed, $49 per 40 cubic feet, was published in respondent's tariff applicable to "Chemicals, viz. N.O.S. Non-Hazardous, Actual value not over $300 per freight ton." United States Atlantic & Gulf-Santo Domingo Conference's Freight Tariff F.M.C. No. 1, 6th revised page 45, Class No. 8. That item, however, contained a rule requiring the shipper to furnish a specific description of the chemicals being shipped on the bill of lading, failing which a "Cargo N.O.S." Class 1 rate ($75 W/M) (Tariff page 36, 2nd rev., effective May 31, 1971) must be assessed. For some reason respondent failed

[15] Agreement No. 6080, approved December 14, 1937, as amended.
[16] P.L. 87-346 (75 Stat. 762), 87th Cong., 1st Sess., October 3, 1961.

to apply its own rule. Complainant was actually assessed a rate of $49 per 40 cubic feet and should have paid $75 W/M according to the tariff rule. Section 18(b)(3), Shipping Act, 1916, mandates that respondent must assess and collect the proper and full freight charge.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 301(F) [1]

ECONOMICS LABORATORY, INC.

v.

PRUDENTIAL GRACE LINE

Complainant found not to have sustained its burden of proving with reasonable certainty and definiteness that a commodity described on respondent's bill of lading as "Industrial Chemical Products" was in fact "Detergent Alkylate" which should have been rated as such instead of "Chemicals N.O.S."

Reparation denied.

M. E. Parker for complainant.
John J. Purcell for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE [2]

Complainant Economics Laboratory, Inc., is a corporation engaged in the business of manufacturing and distributing chemicals and chemical products. Respondent Prudential Grace Line is a common carrier by water engaged in transportation from U. S. Atlantic and Gulf ports to Santo Domingo, Dominican Republic, and as such is subject to the provisions of the Shipping Act, 1916 (the Act).

Complainant alleges that it paid to respondent charges in excess of those lawfully applicable for the transportation of a shipment described on respondent's bill of lading as "Industrial Chemical Products", which shipment was carried on respondent's vessel Santa Mariana from New York, N.Y., to Santo Domingo, bill of lading dated September 23, 1971. Complainant alleges that the shipment actually

[1] As respondent has refused to consent to the informal procedure, the docket number has been renumbered 301(F) as provided by Rule 20(a), 46 CFR 502.311.

[2] This decision is issued pursuant to Rule 20(h) of the Commission's Rules of Practice and Procedure (46 CFR 502.318) and is final unless, within five days from the date of service of the decision, either party requests review by the Commission, asserting as grounds therefor that a material finding of fact or a necessary legal conclusion is erroneous or that prejudicial error has occurred, or unless, within 15 days from the date of service, the Commission exercises its discretionary right to review the decision.

consisted of a product known as "Briteklenz" which is a type of detergent known as an "alkylate" and that respondent should have assessed the rate published in its tariff applicable to "Detergent Alkylate." Complainant seeks reparation in the amount of $227.59 plus 6 percent interest from date of payment.

Respondent denies that the shipment in question was incorrectly rated and contends that it applied the provisions of its tariff properly in accordance with the information furnished by the complainant at the time of the shipment. Respondent contends furthermore that no carrier should have to inquire of a shipper as to the true nature of a shipment but should be able to rely on the description furnished by the shipper, especially when, as here, the shipper attempts to redescribe the shipment almost two years after the shipment took place.

The shipment in question consisted of 75 drums of a product described on the bill of lading as "Industrial Chemical Products", measuring 669 cubic feet and weighing 31,725 lbs. Respondent apparently classified the shipment as "Chemicals N.O.S." and applied the rate of $49 per 40 cubic feet published in its tariff for such a classification.[3] Complainant contends that the correct description on the bill of lading should have been "Briteklenz-Detergent Alkylate" and that respondent should have assessed the rate of $38 per 2000 lbs, applicable to "Detergent Alkylate", as published in respondent's tariff.[4] The resulting overcharge, according to complainant, amounts to $227.59.

DISCUSSION AND CONCLUSIONS

The principal issue raised by the pleadings and supporting documentation, simply stated, is whether the chemical product which comprised the shipment in question consisted in fact of "Detergent Alkylate" so as to qualify for the specific commodity rate published in respondent's tariff under that designation.

In cases of this kind the Commission has established the rule that the determining factor is what the complainant can prove based upon all the evidence as to what was actually shipped. Informal Docket No. 256(I), *Union Carbide Inter-America v. Venezuelan Line,* Order on Review of Initial Decision, November 12, 1973; *Western Publishing Co., Inc. v. Hapag Lloyd A.G.* 13 SRR 16 (1973). Where the shipment has left the custody of the carrier, however, and the carrier is thereby prevented from personally verifying the complainant's contentions, the Commission has held that the complainant has a heavy burden of

[3]United States Atlantic & Gulf-Santo Domingo Conference, Freight Tariff F.M.C. No. 1, 6th rev. page 45; 2nd rev. page 36, Class No. 8.

[4]Ibid, 11th rev. page 49; 2nd rev. page 36, Class No. 11w.

proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, cited above; *Johnson & Johnson International v. Venezuelan Lines*, 13 SRR 536 (1973); *United States v. Farrell Lines, Inc.*, 13 SRR 199, 202 (1973); *Colgate Palmolive Peet Co. v. United Fruit Co.*, 11 SRR 979, 981 (1970). Consideration of the evidence submitted by complainant demonstrates that complainant has not met his heavy burden and has failed to establish with reasonable certainty and definiteness the validity of his claim.

The material evidence which complainant has submitted in support of its contention that the subject shipment consisted of a "Detergent Alkylate" basically consists of the relevant commercial invoice, a product description sheet published by the manufacturer and extracts from a chemical dictionary. The invoice indicates that the shipment consisted of "Briteklenz HC-20." The manufacturer's description sheet states that the product is a "heavy duty alkaline cleaner", used for "high temperature spray or recirculation cleaning", and that it removes various things such as "black stains, discolorations on high temperature processing equipment", and "heavy cooked-on soils." The manufacturer also states, among other things, that the product "Brite-Klenz, Formula HC-20, is compounded with sodium hydroxide, an alkaline stable defoamer, and water conditioning agents." The manufacturer states finally that "this alkaline cleaner will penetrate and disperse heat hardened soils so they rinse off free and clear."

The chemical dictionary definitions submitted by complainant refer to "alkylate" and to "detergent alkylate." "Alkylate" is defined as follows:

> Generic term, particularly in the oil industry, applied to the product of an alkylation process . . . Alkylate generally is blended in varying proportions with other hydrocarbon mixtures also boiling in the gasoline boiling range to produce military and civilian aviation gasolines and motor fuels of commerce.

"Detergent alkylate" is defined as follows:

> Generic term, particularly in the soap industry, applied to the reaction product of benzene or its homologs with a long-chain olefin (such as propylene trimer or tetramer) to produce an intermediate (see, for example, dodecylbenzene) used in the manufacture of detergents. Also refers to an alkylate made from a long-chain normal paraffin which is treated (by chlorination) to permit combination with the benzene to produce a biodegradable or "soft" alkylate.

The basis of the subject claim is the contention that the product in question is not only a detergent but a "detergent alkylate" for which respondent publishes a specific commodity rate. Although, as the manufacturer's product sheet states, "Brite-Klenz" may well be a de-

tergent, it is described not as an "alkylate" but as an "alkaline" detergent. There is nothing to indicate from the evidence submitted that the two terms are synonymous. On the contrary, the standard definitions for "alkaline" bears no resemblance to either of the above referring to "alkylates." [5] If "Brite-Klenz" is the product of an "alkylation process" or is the "reaction product of benzene or its homologs with a long-chain olefin" or is "made from a long-chain normal paraffin which is treated (by chlorination) to permit combination with the benzene" in accordance with the various definitions quoted above, that fact is nowhere shown in the evidence submitted. In short, the only evidence describing the product in any detail, i.e., the manufacturer's description sheet, nowhere mentions "alkylates" or the "alkylation process", stating merely that the product "is compounded with sodium hydroxide, an alkaline stable defoamer, and water conditioning agents."

The subject shipment has long since left the custody of the carrier. Under these circumstances, as the Commission has stated, complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. Even assuming that the subject shipment, described only as "Industrial Chemical Products" on the bill of lading was in fact a detergent, nothing in the record demonstrates with reasonable certainty and definiteness that this particular detergent was manufactured in accordance with an "alkylation process" or in some other way was entitled to be described as a "detergent alkylate." Considering the Commission's insistence that complainants in cases such as these be held to a high standard of proof, reparation on the basis of the present record cannot be awarded.[6]

ULTIMATE CONCLUSIONS

Complainant has furnished evidence which does not establish with reasonable certainty and definiteness that a shipment described on

[5] See, e.g. Van Nostrand's Chemist's Dictionary (1953 Ed.) which defines "alkaline" as follows:

Exhibiting some or all of the properties of an alkali . . .

"Alkali" is defined as:

A term that was originally applied to the hydroxides and carbonates of sodium and potassium but since has been extended to include the hydroxides and carbonates of the other alkali metals and ammonium.

[6] Even if complainant had clearly proved its case, there are other factors which cast doubt on the validity of the claim. The rate which complainant was assessed, $49 per 40 cubic feet, was published in respondent's tariff applicable to "Chemicals, viz. N.O.S. Non-Hazardous, Actual value not over $300 per freight ton." United States Atlantic & Gulf-Santo Domingo Conference, Freight Tariff F.M.C. No. 1, 6th rev. page 45; 2nd rev. page 36, Class No. 8. That item, however, contained a rule requiring the shipper to furnish a specific description of the chemicals being shipped on the bill of lading, failing which a "Cargo N.O.S." rate ($75 W/M) was supposed to be assessed. For some reason respondent failed to apply its own rule. It would appear, therefore, that complainant, who is now asking for a rate of $38 per 2000 lbs., was actually assessed a rate of $49 per 40 cubic feet but probably should have paid $75 W/M, according to the tariff rule.

respondent's bill of lading as "Industrial Chemical Products" was in fact a particular type of detergent known as "detergent alkylate" which would have been entitled to a lower rate than what was actually assessed. There are indications, furthermore, that respondent might have failed to follow its own tariff rule regarding the furnishing of specific descriptions and that complainant has probably enjoyed the benefit of a rate lower than the "Cargo N.O.S." rate prescribed in the rule. Accordingly, the claim for reparation is denied and the complaint is dismissed.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D. C.,
January 3, 1974.

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

INFORMAL DOCKET NO. 322 (I)

SCHEER ENTERPRISES CO., INC.

v.

VENEZUELA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

Mar 20 1975

Notice is hereby given that the Commission on March 20, 1975, determined not to review the decision of the settlement officer in this proceeding served March 7, 1975.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 322(I)

SCHEER ENTERPRISES CO., INC.

v.

VENEZUELA LINE

Reparation awarded

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER.[1]

Scheer Enterprises Co., Inc. (Scheer) claims $168.48 as reparation from Venezuela Line for an alleged freight overcharge on a shipment carried from Houston, Texas to La Guaira, Venezuela via the MS CIUDAD DE MARACAIBO V/I on Bill of Lading No. 23 dated March 26, 1973.

The parties do not disagree on the commodity description or class rate assessed, however Venezuela Line assessed non-contract rates and Scheer filed a claim on October 12, 1973, stating it was a contract shipper entitled to the lower contract rate. The claim was denied because it was not submitted within six months of the date of shipment as required by Item II of the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2.[2]

Both Venezuela Line's agent and Scheer confirm that the latter signed the dual rate contract involved on March 12, 1973. The contract rate should have been assessed on the movement.

Scheer paid $431.45 for the movement of the subject shipment based on the assessment of the non-contract rate. The shipment consisted of 50 cases of battery operated warning lights measuring 135 cubic feet, weighing 1,215 pounds, and 9 cases of transformers mea-

[1]Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502. 301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2]The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits. *Colgate Palmolive Company* v. *United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970. The bill of lading here is dated March 26, 1973 and the claim was filed October 12, 1973.

suring 18 cubic feet, weighing 210 pounds. Both commodities take a Class 6 rate, i.e: Battery Powered Lamps, actual value not over $500 per freight ton, and Electric Transformers. The class rates apply per ton of 40 cubic feet or 2,000 pounds, whichever produces the greater revenue. As both commodities cube over 40 cubic feet per 2,000 pounds the rates are assessed on a measurement basis.

The following rate computations apply:

50 cases of Battery Powered Lamps, actual value not over $500 per freight ton measuring 135 cubic feet—3.375 measurement tons ($67.50)–$227.81;

9 cases of Electric Transformers measuring 18 cubic feet—.45 measurement tons ($67.50)–$30.38;

Bunker surcharge—153 cubic feet—3.825 measurement tons ($1.25)–$4.78;

Package charge [3]—59 packages ($.03)–$1.77.

Applicable rates and charges total $264.74. Scheer paid Venezuelan Line $431.45. Claimant was overcharged $166.71 and the claim is for $168.48, $1.77 more than it apparently should be. It appears that in its computations Scheer overlooked the $1.77 package charge referred to above.

Scheer is therefore awarded reparation in the amount of $166.71 with interest at the rate of 6 percent per annum if not paid within 30 days of the date hereof.

(S) JUAN E. PINE,
Settlement Officer.

[3]Conference Tariff Item 9 provides: ". . . in addition to the rates published herein all shipments to Venezuelan ports are subject to a charge of $.03 per package or piece. . . ."

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–50

THE CAMPBELL SOUP COMPANY

v.

THE UNITED STATES LINES, INCORPORATED

NOTICE OF ADOPTION OF INITIAL DECISION

Mar 24 1975

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Stanley M. Levy, in which he determined that the Complainant, Campbell Soup Company, had not been subjected to the payment of rates for transportation which were unjust and unreasonable, and therefore denied Complainant's claim for reparation.

Complainant excepts to this Initial Decision, both generally and specifically. Respondent, United States Lines, excepts only to that portion of the Initial Decision which deals with the New Jersey law establishing highway weight limits. Upon careful consideration of the record in this proceeding, we conclude that the Presiding Officer's findings and conclusions set forth in his Initial Decision are, except as hereinafter noted, proper and well founded and we accordingly adopt them as our own. However, and without disturbing any of these findings and conclusions, there are certain matters raised on exception which, we believe, warrant some discussion. Exceptions not specifically considered or discussed have nevertheless been reviewed and found to either constitute reargument of contentions already properly disposed of by Judge Levy or to be otherwise without merit.

Complainant first excepts to the Administrative Law Judge's reliance on shipment weight and measurement figures on the bills of lading to support the finding that for most of the shipments at issue the containers were loaded to 85 percent, or nearly 85 percent, of their cubic, which is the minimum cubic for which the shipper had to pay for measurement cargoes under Tariff Rule 28(11). Complainant

alleges a discrepancy on the bills of lading between the number of packages shipped in the various containers, their weight, and their cubic displacement.[1] Further, using an average cubic measurement per package, Complainant reconstructs the "actual cubic" occupied in each container shipment at issue. These latter figures, Complainant submits, show that in only a few shipments in 20-foot containers and in no shipments in 40-foot containers did its cargo occupy the 85 percent of cubic for which it had to pay.

We are not particularly impressed with this argument. In the first place, it should be noted that the complaint in this proceeding was filed some 18 months after the last shipment at issue was tendered to the carrier. It should also be noted that the reconstructed "actual cubic" is based on an *alleged* average per case cubic not substantiated other than by continued assertion. While Complainant's claim for reparation is not based solely on bill of lading errors, proving that the shipments in question were not, with respect to volume at least, properly described in the bills of lading is an important part of Complainant's claim. Where a shipper's claim rests solely on alleged bill of lading errors the Commission has held that such claims ". . . [O]f necessity involve heavy burdens of proof on the part of the shipper once the shipment has left the custody of the carrier." [2] Whatever the merits of Complainant's exceptions in this respect, however, its claim falls for other reasons.[3]

In his Initial Decision, Judge Levy finds that Respondent offers both 20 and 40-foot containers for house-to-house movements and appears to suggest that, insofar as Tariff Rule 28(11) and the New Jersey law are concerned, the 20-foot container is more suitable to the carriage of Complainant's cargo given its stowage characteristics. In so doing, the Administrative Law Judge notes, however, that Complainant had not introduced evidence that it was forced to take 40-foot containers from Respondent when it requested 20-foot containers or that Respondent notified Complainant that 20-foot containers were unavailable. Complainant in his exceptions proposes to supply this missing evidence by presenting a summary of the oral recollections of an employee of Complainant to the effect that Complainant had to take what containers were available from Respondent regardless of size. We are not persuaded by this "evidence" and we have no reason not

[1] The number of packages, and their weight, vary on the bills of lading but the respective cubic occupied is nearly constant.

[2] *Abbott Laboratories v. Prudential Grace Lines*, Docket No. 73-23, Report served November 9, 1973.

[3] Likewise, and because the complaint in this proceeding fails on other grounds, we need not consider whether the Commission's recent decision in *Kraft Foods v. Moore McCormack Lines, Inc.*, Docket No. 73-44, Report served March 26, 1974, reconsideration denied on December 13, 1974, which relates to reparation cases involving misapplication of rates generally, is controlling here or otherwise dispositive of the issues raised.

to believe that Complainant was only the victim of his own imprudent choice.

In the course of his decision, the Administrative Law Judge found that New Jersey law [4] prohibited the movement of a container loaded with 45,000 pounds of cargo over New Jersey highways though he did not find Respondent's Tariff Rule 28(11) unlawful. Complainant, in its exceptions, argues that such a finding with respect to New Jersey law of necessity leads to a conclusion that Tariff Rule 28(11) is unjust and unreasonable because only by loading 45,000 pounds in a 40-foot container can a shipper avoid having to pay for the 85 percent cubic minimum in Tariff Rule 28(11) for measurement cargoes.

This argument might be persuasive were it not for the fact that, notwithstanding the Administrative Law Judge's finding to the contrary, the New Jersey law in question does not necessarily or directly prohibit the moving of a container loaded with 45,000 pounds over New Jersey highways. In this regard we agree with the position taken by Respondent in its sole exception.

The New Jersey law speaks in terms of gross weight (22,400 pounds) which may be imposed on the highway by the wheels of any one axle of a vehicle. Further, the law incorporates by reference certain federal laws on vehicle and axle weight limits. Under these laws it was permissible at the time this complaint was filed to have a tractor trailer combination of gross weight of 73,280 pounds.[5] Thus, if the combined weight of the tractor and trailer excluding cargo was 28,280 pounds or less, then 45,000 pounds or more of cargo could apparently be legally carried on New Jersey highways.

There is one final matter mentioned in the Initial Decision, which we believe requires clarification. This proceeding involves the domestic offshore trade of the United States and the matters raised and argued by the parties and disposed of in the Initial Decision all relate to provisions of section 18(a). The Complainant in its complaint and Memorandum of Fact alleges that Respondent's practice complained of was unjust and unreasonable in violation of "section 817" and "section 817, 46 USC 817", respectively, both of which refer to section 18(a), Shipping Act, 1916. Correspondingly, Respondent in his Answering Memorandum of Fact states he did not violate section 18(a). The Administrative Law Judge, however, made his findings of a nonviolation in terms of "section 17 of the Shipping Act, 1916." This we understand was inadvertent and should be corrected to refer to section 18(a) of the Shipping Act, 1916. Thus, the "Ultimate Conclusions"

[4] 39 N.J. Stat. Ann. §3–84 (1975)

[5] Federal-Aid Highway Amendments of 1974, Pub.L. 93–643, 88 Stat. 2283 (1975), amended 23 USC§127 to increase overall gross weight limit to 80,000 pounds.

in the Initial Decision should be amended to read ". . . [R]espondent did not violate section 18(a) of the Shipping Act, 1916; and the claim for reparations is denied."

Therefore, subject to the aforementioned modifications, we adopt the Initial Decision as our own and make it a part hereof and dismiss the complaint. *Commissioners Ashton C. Barrett and Clarence Morse, concurring.*

We concur in denying reparations. Here, respondent's tariff contained the following rule:

> Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before the shipment leaves the custody of the carrier.

Complainant failed to present written claim to the carrier before the shipment left the custody of the carrier, and such failure is dispositive of the matter. *Kraft Foods, supra.* Hence, the majority's comments concerning heavy burden of proof and reference to *Abbott Laboratories, supra,* are misleading and contrary to the principles established in *Kraft Foods, supra.*

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 73–50

THE CAMPBELL SOUP COMPANY

v.

THE UNITED STATES LINES, INCORPORATED

Respondent charged and collected only those amounts properly due pursuant to its tariff.
Respondent's tariff was just and reasonable and not otherwise unlawful.
Respondent did not violate section 17 of the Shipping Act, 1916.
Reparation denied.

G. C. Snyder for complainant.
Russel T. Weil and *James P. Moore* for respondent.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE [1]

By Complaint filed with the Federal Maritime Commission on August 8, 1973, Campbell Soup Company (Campbell) alleged that, in the course of shipping canned foodstuffs and frozen food by United States Lines, Inc. (USL) container service from East Coast ports to Hawaii under the published terms, conditions and rates of USL's East Coast United States to Honolulu, Freight Tariff No. 1, FMC No. 2,[2] Campbell was subjected to the payment of rates for transportation which were when exacted and still are unjust and unreasonable and in violation of Section 17 of the Shipping Act, 1916. Campbell, in its complaint, seeks reparations in the amount of $44,632.61 [3] which amount is alleged to be the difference between what it considers to be a just and reasonable rate on the shipments identified in Appendices A and B to its Complaint and the amount charged by Respondent USL in accordance with its published tariff rates, rules and regulations.

Pursuant to the request of complainant, concurred in by respon-

[1] This decision became the decision of the Commission 3/24/75
[2] Cancelled December 15, 1973, superseded by USL Freight Tariff No. 56, FMC No. 56.
[3] Apparently reduced to $42,343.00 in its memorandum of facts, served December 28, 1973.

dent, this proceeding is being determined in accordance with Rule 11 (shortened procedure) of the Commission's Rules of Practice and Procedure. Accordingly, the complainant served a memorandum of facts and arguments upon which it relies (Rule 11b); respondent served an answering memorandum (Rule 11c); and complainant served a reply memorandum (Rule 11d).

The 81 shipments in question occurred in the period between July 28, 1971 and February 7, 1972 and would normally have been made from the port of San Francisco to Hawaii; however, during the West Coast maritime strike in late 1971 and early 1972, Campbell out of necessity made the shipments from the East Coast. Campbell resumed West Coast routing after the strike.

Shipments of canned goods were moved under the provisions of Item 210, U.S. Lines Freight Tariff #1, FMC—F No. 2 which specifies a rate of $40.00 weight or measurement. Shipments were also subject to Rule 28, sub-paragraph 11, page 64P, which specifies the minimum weight or minimum cargo cube which must be loaded in each container.

USL received a request from Campbell in January 1972, and, after obtaining special permission from the Commission to waive the normal 30 day notice period, granted temporary relief effective February 9, 1972 by publishing a rate on canned goods in Item 2063 of $41.00 per short ton with a minimum of 45,000 pounds for a 40-foot container and a minimum of 41,000 pounds for a 20-foot container. This rate expired May 9, 1972. Effective February 14, 1972, U.S. Lines published a rate of $109.65 per short ton with a minimum of 41,000 pounds in Item 2064 applicable on frozen food. This rate expired May 17, 1972.

Complainant does not challenge either:

(a) the concept that an ocean carrier may charge the greater of the freight computed on a weight and measurement basis, or

(b) the concept that a carrier may require a shipper who elects to stuff his own container to either use or pay for a fixed percentage of the weight or space.

In fact Campbell does not complain that any particular concept, rule, rate or regulation is, by itself, unjust or unreasonable. In essence what Campbell asks is that it be granted relief from the result which followed the application and interpretation of USL's tariff under circumstances of conflict with the State of New Jersey transportation regulations.

Of the 81 shipments in issue in this proceeding 40 were made in 20 foot containers and the remaining 41 in 40 foot containers. All but one of the shipments was freighted on a measurement basis.

Rule 28(11) of USL's East Coast to Honolulu Tariff No. 1 (FMC No. 2) provided:

> Rule 28 *General Application—Rates, Charges and Conditions.*
>
> 11. When a container is loaded by the Shipper or his authorized representative, freight charges shall be calculated at the applicable rate based on the percentage of the capacity of the container as set forth below.
>
> In the case of container loaded with a single commodity rated on a measurement basis, the minimum shall be calculated at 85% of the total inside cubic capacity of the container except where the weight capacity of the container has been utilized.
>
> In the case of container loaded with a single commodity rated on a weight basis, the minimum shall be calculated at 95% of the total weight capacity of the container except where the cubic capacity of the container has been fully utilized.
>
> For the purpose of calculating Ocean Freight, a twenty-foot container shall have a cargo weight capacity of 41,000 pounds, and cargo cube capacity of 1093 cubic feet—a forty-foot van shall have a cargo weight capacity of 45,000 pounds and cargo cube capacity of 2233 cubic feet—a refrigerated container shall have a cargo weight capacity of 41,000 pounds and cargo cube capacity of 1900 cubic feet. . . .

Out of a total of 40 shipments made in 20 foot containers, Campbell exceeded the 85% cubic minimum in 18 cases, stuffing them with more than the required 929 cubic feet of cargo, thereby paying freight only for interior container space actually used. In 19 additional shipments, the Bills of Lading and Campbell's Appendix A indicate that Campbell met the 929 cubic foot minimum for 20 foot containers. In only three cases it would appear that Campbell did not meet the cubic minimum for 20 foot containers.

Out of a total of 41-40 foot containers, Campbell exceeded the published cubic minimum with 4 containers it stuffed and tendered to USL, each of which were reefers. In 25 additional shipments, the Bills of Lading and Campbell's Appendix A indicate that Campbell substantially used at least 85% of the interior cube of the 40 foot containers and met the required minimum. In only seven shipments did Campbell fall short of the 85% cubic minimum.

In one case (B/L #4063), Campbell loaded a 40 foot dry container with canned foodstuffs weighing 48,623 lbs. and occupying 839 cubic feet with the result that in accordance with the exception provided in Rule 28(11), Campbell was charged freight based on the actual weight of the cargo tendered.[4]

The fact that Campbell exceeded the cubic minimum in 18 of the 40 20′ containers it stuffed and tendered to USL indicates that the stowage characteristics of its product did not physically preclude it from satisfying the minimum cubic load for a 20 foot "house-to-house" container.

[4]The 85% of cubic capacity rule applies except when a shipper fully utilizes the published weight capacity of the container, in which event the cargo is rated at actual weight or measure, whichever produces the greater revenue.

USL offers both 20 and 40 foot containers for house-to-house movement. Campbell suggests only that the stowage characteristics of its product are not compatible with the cubic minimums published for 40 foot containers. If indeed that be the case, USL contends that the suitability of 20 foot containers to carry for example 35,470 lbs. of canned foodstuffs with a cube of 945 ft. as per USL B/L #4093 would seem to avoid any claim of unjust or unreasonable expense to a shipper requesting the most suitable transportation equipment.

Disputing USL's contention, Campbell argues that during the west coast strike Campbell could not request the most suitable transportation equipment but was forced to take whatever equipment was available from USL, regardless of size, in order to make any shipments at all. In this regard, however, Campbell has introduced no evidence that it made call on USL for 20 foot containers and was advised by USL that it would have to take 40 foot containers because of the unavailability of 20 foot containers.

In the case of a forty-foot container, Campbell faced a measurement basis (1898 cubic feet for canned goods). Under Rule 28(11) in order to avoid the full 1898 cubic ft. minimum, 45,000 pounds had to be loaded in the trailer. In New Jersey, it is unlawful to transport 45,000 pounds in a trailer over the public highways and it was unlawful, also, to exceed 73,320 pounds on a 5 axle unit. Normal weight of a unit with driver and fuel was approximately 29,000 to 32,000 pounds. This allowed about 41,000 to 44,000 pounds for product load. In short, to attain lawfully the minimum weight of 45,000 pounds was impossible.[5] This meant that Campbell was required to pay the cubic minimum of 1898 feet. Other shippers, however, with product weighing a few pounds greater per case than Campbell's could take advantage of the rate on a weight basis. They would pay lower freight charges but still occupy the same cube as Campbell's trailers.

Campbell's claim for reparation is premised upon its contention that although a weight or measurement tariff is not necessarily unjust or unreasonable it is unjust and unreasonable when a particular commodity because of its specific density is precluded from fully utilizing available space because of New Jersey highway weight limits.

The Commission has recognized the validity of a weight/measurement rule. "Rates applying to weight or measurement of cargo which-

[5]Nevertheless, one 40 foot container was freighted on a weight basis. (B/L 4063) This occurred because:
(1) The shipment met the published 45,000 lb. weight capacity; and
(2) The 48,623 lbs. occupied only 839 ft. cube resulting in the freight based on actual weight being greater than that based on actual cube.
Three other container loads also exceeded the 45,000 lb. minimum: B/L 4025 (45,542 lbs); B/L 4078 (51,145 lbs); B/L 4079 (48,106 lbs).

ever produces the greater revenue are customary in the ocean trades of the United States." (*Orleans Materials & Equipment Co., Inc.* v. *Matson Navigation Co.*, 8 FMC 160, 163 (1964)).

In support of its position, Campbell attacks the container minimum found in Rule 28(11). Is such a rule just and reasonable?

USL contends that it operates full container vessels and what it has to sell is space and weight capacity in containers. Ideally, each container would have a cargo mix which would utilize its full capacity. When a carrier loads and stuffs containers, it has control over the utilization per container and can come as close to the ideal of full utilization of cube and/or weight capacity as possible.

In contrast, when a shipper such as Campbell requests "house to house" use of the container, the carrier loses all control over maximizing the actual utilization of the cube and weight capacities of the container. Shipper stuffs and seals the container at his plant and delivers it to the carrier ready for ocean transport to its B/L destination.

For the shipper, the concern only is that this cargo move to destination at the lowest rate. For the carrier, the concern is that it achieve the highest utilization possible for all the space and weight it has to sell.

A shipper has a choice. He may tender his cargo for stuffing by the carrier, in which case the carrier charges only for the actual weight or measure of the cargo tendered and the carrier assumes the burden of obtaining a proper per container mix of cargo. However, when the shipper elects, as did Campbell, to stuff his own container and have it move directly from his plant to a customer, the carrier assesses a minimum to insure that for the space and weight represented by the container he achieve proper amount of revenue. Rule 28(11) thus requires shipper to use or pay for at least 85% of the cubic or 95% of the weight capacity of a "house-to-house" container whichever produces the greater revenue to the carrier.

In support of its claim Campbell argues that the special relief from the minimum cube requirements of Rule 28(11) published by USL after Campbell's request is an admission that the prior application of Rule 28(11) to Campbell's shipments was unreasonable. No such conclusion can be drawn.

In its reply USL points out that after receiving the request from Campbell, ULS reviewed the applicability of Rule 28(11) to the commodities to be shipped by Campbell with USL's all water service to Hawaii and determined that the volume available coupled with the fact that such commodities could only move by water from the East Coast during the West Coast strike warranted special

relief. Prior to Campbell's request, USL was unaware of and had no control over the stowage characteristics of the commodities shipped by Campbell. Campbell had not previously relied upon USL's container service to Hawaii from East Coast and when the strike ceased, it reverted to West Coast movement. The extraordinary relief granted upon application for the remainder of the strike period has no bearing upon USL's obligation to collect freight as per its previously published tariff rates, rules and regulations.[6]

Contrary to Campbell's allegations, the tariff modifications did not establish new container capacities but left in effect the 45,000 lb. minimum for a 40 foot container and the 41,000 lb. minimum for a 20 foot container. In this case carrier elected upon shipper's request to change to a weight only basis for shippers who did in fact tender shipments weighing at least 41,000 lbs. (in a 20 foot container) or 45,000 lbs. (in a 40 foot container) and to raise that commodity rate from $40.00 to $41.00 per short ton.

Campbell does not seek reparation for shipments made under this temporary rate and poses no objection to the qualifying weight requirements for that rate. Given Complainant's favorable reference to and acceptance of the temporary rate for 20 and 40 foot containers loaded with 41,000 lbs. or 45,000 lbs., it should be observed that even if this change were applied retroactively, Campbell failed to meet these weight minimums on 77 of the 81 containers for which it now seeks reparations.

When the strike terminated, Campbell resumed its shipments via the West Coast and USL's temporary modification was no longer necessary. If Campbell is inclined to use USL's East Coast to Hawaii service on a regular basis, it is, of course, free to submit a "shipper's request" for such relief from tariff provisions as may be justified by the volume of cargo it would tender, the stowage characteristics of such cargo, and the competitive circumstances presented.

ULTIMATE CONCLUSIONS

For all the foregoing reasons it is determined that the Respondent charged and collected only those amounts properly due pursuant to its tariff; that said tariff was just and reasonable and not otherwise unlawful; that respondent did not violate section 17

[6]Section 18(b)(3), Shipping Act, 1916; Section 2, Intercoastal Shipping Act, 1933.

of the Shipping Act, 1916; and the claim for reparations is denied. Complaint dismissed.

(S) STANLEY M. LEVY,
Administrative Law Judge.

MAY 7, 1974,
Washington, D.C..

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 465

DIETERLE & VICTORY INTL. TRANSPORT CO. INC.
FOR THE ACCOUNT OF DRAPER DIVISION
ROCKWELL INTERNATIONAL CORPORATION

v.

AMERICAN PRESIDENT LINES

NOTICE OF ADOPTION OF INITIAL DECISION

Mar 26 1975

Notice is hereby given that upon review of the initial decision in this proceeding, the Commission has determined that the conclusions therein are proper and well-founded. Accordingly, the initial decision of the Administrative Law Judge is hereby adopted as the decision of the Commission in this proceeding.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 465

DIETERLE & VICTORY INTL. TRANSPORT CO. INC.
FOR THE ACCOUNT OF DRAPER DIVISION,
ROCKWELL INTERNATIONAL CORPORATION

v.

AMERICAN PRESIDENT LINES

Application for permission to refund a portion of the freight charges denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE [1]

American President Lines (APL), has applied for permission to refund a portion of the freight charges on a shipment of textile machinery under a bill of lading dated July 3, 1974. APL carried the cargo of 475 boxes of textile machinery from Port Elizabeth, New Jersey, to Singapore. The Atlantic and Gulf-Singapore, Malaya and Thailand Conference (the Conference), of which APL is a member, adopted a special project rate effective January 9, 1974, for another shipper as the sole shipper qualified to receive such rate. In mid-June complainant (Draper Division, Rockwell International Corporation, for whose account this application was filed), received an order for machinery to be shipped in connection with this project. Upon the complainant's inquiry, the Conference informed it of the special project rate. The complainant on June 28th, requested in writing that the Conference amend the project rate by adding the name of the complainant as a qualified shipper. Complainant failed to request prompt Conference action by special meeting or by telephone vote. Accordingly, the complainant's request was taken up at the Conference's next regular meeting on July 11, 1974, at which time the project rate was amended, deleting reference to a specific shipper and reading instead "when shipped by/or consigned to Overseas Textile Company." Such amendment was duly filed and became effective on July 17, 1974. Meanwhile

[1] This decision became the decision of the Commission 3/26/75.

a letter of credit opened by the consignee in favor of the shipper on June 26, 1974, was to expire on July 15th, and could not be extended. Complainant therefore was forced to utilize "the only shipping opportunity" available prior to the expiration of the letter of credit. Complainant is supplying machinery to this project on a continuing basis and must be in a position to extend a uniform approved rate consistently to the consignee.

The project rate in effect at the time of the shipment was the Atlantic and Gulf-Singapore, Malaya and Thailand Conference Freight Tariff No. 15 FMC-3, Revised First Page 195 M, effective May 8, 1974, $98.50 W/M.

The application does not indicate the basis on which freight charges were collected but in view of the disposition of the application, no inquiry need be made. It is alleged that the charge under the project rate would have been $202,359.09. It is further alleged that the charge under the applicable rate at the time of shipment, that is at $133.50 W/M, was $263,415.72. Permission is sought to refund the difference between the two charges, that is, $61,056.63.

Section 18(b)(3) of the Shipping Act, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Voluntary payment of reparation—Special docket applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the applicable law. Briefly, it provides that the Federal Maritime Commission may, in its discretion and for good cause, permit a common carrier by water in the foreign commerce of the United States to refund a portion of the freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where there is an error in a tariff of a clerical or administrative nature and such refund will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally, the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298) [2] specifies that carriers are authorized

[2]House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report [3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

This application fails to fit into the scheme of the exemptive clause of section 18(b)(3). As observed before, refund or waiver of the collection of a portion of the freight is permitted where "there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff." The inapplicability of the special project rate is not due to an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff. It is due to the failure of the parties to act promptly to amend the tariff to bring Draper under the coverage of the project rate.

Since the exemptive clause is not applicable to the situation presented here, then the general rule of *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 1965, and *Tilton Textile Corp. v. Thai Lines, Ltd.*, 9 F.M.C. 145, 1965, is dispositive of this application. In the absence of exemptive authority, the Commission may not permit deviations from the rates on file. Accordingly, waivers of collections of undercharges may not be granted and authorizations of refunds are unnecessary. The law forbids the former and directs the latter. See also *Louisville & N. R. R. Co. v. Maxwell.* [4] The application to refund a portion of the freight charges is therefore denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D. C.,
November 5, 1974.

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

[4] 237 U.S. 94 (1915).

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–38

UPJOHN COMPANY,
POLYMER CHEMICALS DIVISION

vs.

SEA-LAND SERVICE, INC.

ORDER ON REVIEW OF INITIAL DECISION

Mar 26 1975

This proceeding is before us for review on exceptions to the initial decision of Administrative Law Judge William Beasley Harris. In his initial decision, Judge Harris determined that complainant's request for reparation for an alleged overcharge of ocean freight should be denied and further that respondent had in fact undercharged complainant and should proceed to collect amounts due.

Upon consideration of the record in this proceeding we have determined that the exceptions constitute reargument of contentions already considered by the Administrative Law Judge and properly disposed of by him. We agree with the ultimate conclusions of the initial decision attached hereto and hereby adopt them as our own.

Accordingly, it is ordered that the complaint in this proceeding is hereby dismissed.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74–38

UPJOHN COMPANY,
POLYMER CHEMICALS DIVISION

v.

SEA-LAND SERVICE, INC.

Reparation denied.

Hill, Betts & Nash by *Edwin Longcope* and *John P. Love,* for the complainant.

Frank Hiljer, Jr., Commerce Manager of respondent, for the respondent.

INITIAL DECISION ON CLAIM FOR REPARATION OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was conducted under the Shortened Procedure as provided for in Rule 11(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.181. After mesne telephone conversations and letters as to a procedural schedule, a Memorandum of Facts and Law was filed October 24, 1974, by the complainant to which the respondent on November 19, 1974, filed an Answering Memorandum of Facts and Arguments, to which the complainant on December 5, 1974, filed a Reply Memorandum. These filings having been completed, ordinarily the record would have been closed for decision, but the Presiding Administrative Law Judge, upon examining all of the above filings, discovered that neither the complainant nor the respondent ever referred to the section of the applicable tariff or any basis for the respondent's original charge of $72.50 per 2,240 lbs., a total of $15,572.74 for transportation of the freight, so that on December 10, 1974, a notice was served requiring submission by the parties within ten (10) days of additional facts. The respondent filed under the request on December 20, 1974, and the complainant (who on December

[1] This decision became the decision of the Commission Mar 26, 1975

24, 1974, by telephone advised the Presiding Administrative Law Judge that complainant's counsel had suffered a sprained ankle, causing delay in preparing the additional facts) filed on December 26, 1974. This closed the proceeding save for this initial decision.

FACTS

The Upjohn Company, Polymer Chemicals Division (Upjohn), a Delaware corporation, complainant herein, whose principal business is the manufacture of chemicals, between January 1, 1973, and March 31, 1973, shipped on board the respondent Sea-Land Service, Inc.'s (Sea-Land) vessels *S.S. Galloway* and *S.S. McLean*, three separate shipments [2] of a chemical known as Diphenylmethane Diisocyanate, from Elizabethport, New Jersey, to Rotterdam, Holland, for which Sea-Land charged and collected from Upjohn the sum of $15,572.74. Upjohn contends that the sum charged and collected by Sea-Land, a common carrier by water in foreign commerce, is a greater compensation for the transportation of the said chemical than those provided in the North Atlantic Continental Freight Conference Tariff No. (29) FMC-4, on file with this Commission (of which conference Sea-Land is a member, and under which tariff it operated) in violation of section 18(b)(3) of the Shipping Act, 1916. Upjohn seeks reparation from Sea-Land in the amount of $1,480.24, claiming that the charge for the freight transportation should have been $60.00 per cubic foot, made under Item No. 510.0001.225, Service 3 of Tariff No. (29) FMC-4, entitled "Chemicals N.E.S.—Not Elsewhere Specified), up to/including $1,500 per 2,240 lbs., or $14,092.50 rather than the $15,572.74, paid.

Sea-Land denies any overcharge, asserting rather, that due to its clerks erroneously having selected the rate to apply, and having overlooked completely that the shipments were moving under refrigerated controlled temperature with 0–10 degrees F. to be maintained as specified on the bill of lading by the shipper, there was an undercharge. Sea-Land, in asking dismissal of the complaint, asserts

[1] 1. Bill of Lading No. 959395 dated January 30, 1973, 260 steel drums of "Diphenylmethane Diisocyanate," flashpoint is 425 degrees. 0–10 degrees to be maintained. "Under Refrigeration." Measurements 2,996 cubic feet, gross weight 153,440 lbs. The charge of Sea-Land for the 153,440 lbs. at $72.50 per 2,240 lbs. was $4,966.25. Vessel *S.S. Galloway*.

2. Bill of Lading No. 971528 dated February 10, 1973, 350 steel drums "Diphenylmethane Diisocyanate," flashpoint is 425 degrees. 0–10 degrees is to be maintained. Measurements 3,745 cubic feet, gross weight 191,800 lbs. The charge of Sea-Land for the 191,800 lbs. at $72.50 per 2,240 lbs. was $6,207.81. Vessel *S.S. McLean*.

3. Bill of Lading No. 980047 dated March 3, 1973, 248 steel drums Chemicals N.E.S. (Isonate 125M —Diphenylmethane Diisocyanate), flashpoint 425 degrees F. Temperature to be maintained at 0 to 10 Deg. F. at all times. Measurements 2,654 cubic feet, gross weight 135,904 lbs. The charge of Sea-Land for the 135,904 lbs. at $72.50 per 2,240 lbs. was $4,398.68. Vessel *S.S. McLean*.

that the erroneous application of rate on each of the involved shipments has been corrected and balance due bills issued, based on the rate of $197.00 per ton of 2,240 lbs. or 40 cubic feet published in Item No. 931.0001.109 of the said Tariff No. (29) FMC-4.

Issue

Where a claim is made against a carrier for reparation, and the carrier confesses that the rates and charges were made for the transportation of the freight but were incorrect due to the carrier's clerical errors resulting not in an overcharge but an undercharge, the issue is whether the clerical errors and action thereon by the carrier, produced a situation amounting to an ambiguity in the applicable tariff on file with this Commission, warranting the granting of the reparation requested?

Holding

It is held, for the reasons hereinafter stated, that the clerical errors involved herein do not rise to creation of an ambiguity in a filed tariff, thus reparation should be denied. The carrier must proceed forthwith to collect all amounts due by virtue of undercharging for transporting the freight in this case, resorting, if necessary, to the appropriate legal forum. And, the carrier shall keep the Commission promptly and fully informed of the receipt or non-receipt of payments due, as well as of any and all actions taken to collect such amounts, so that the Commission's and the carrier's on-going responsibility for compliance with the Shipping Act, 1916, can be met and upheld.

Discussion

The threshold issue in a tariff interpretation problem is determining whether an ambiguity in the tariff does in fact exist. *United Nations Children's Fund v. Blue Sea Line,* 15 F.M.C. 206, 209 (1972). In the instant case, it is not a question of ambiguity. It is, as has been stated above, a question of clerical errors by the carrier and whether such errors qualify as creating an ambiguity in the applicable sections of the tariff in issue, that of the North Atlantic Freight Conference Tariff No. (29) FMC-4, warranting reparation to the shipper for alleged overcharges by the carrier. For reasons stated in the Shipping Act, 1916, section 18(b)(3), no carrier shall charge or demand or collect or receive a greater or less or different compensation than the rates and charges which are specified in the tariffs on file with this Commission and in effect at the time; nor rebate, refund or remit in any manner or by any

device any portion of the rates or charges so specified. To permit clerical error to abrogate these strong commands of the law, would flout the law. The carrier's compounded clerical errors in this case, stand corrected, thus permitting application of the proper rates and charges for transportation of the particular freight as called for by the tariff. The previous errors, now corrected, cannot be used to impute an ambiguity to the filed tariff. Under the circumstances of this case it is held that as to the subject matter and shipper's instruction for handling the freight, no ambiguity in the tariff exists.

Therefore, Sea-Land is required to charge what the tariff demands. And, it would seem that in view of the admitted compounding errors herein, Sea-Land should take a hard look at its management in the concerned area. However vexing may be the clerical errors such as are exhibited in this instance, there can be no equitable balancing to tilt the filed tariff toward an estoppel from correction of the errors, thus creating an ambiguity, even if to compensate for such errors, because the Act does not permit such equitable balancing. Having finally corrected the charges and applied the applicable section of the tariff, Sea-Land is obligated to collect the proper amount. Under the Act, there is no authority to order the shipper to pay to Sea-Land the amount due because of the carrier's undercharging, nevertheless, to comply with the Act the carrier must make every effort to collect the proper amounts and to keep the Commission fully informed as to these efforts and collections.

Sea-Land admits to having applied an erroneous rate ($72.50 per ton of 2,240 pounds) on the three shipments described as Diphenylmenthane Diisocyanate. Sea-Land also gave the basic or source documents upon which it determines the rate to be charged, calculates the freight charges, prepares invoices for charges and other documents for internal use and records, they consist of:

(1) A dock receipt which accompanies delivery of the shipment to Sea-Land's loading terminal.
(2) The ocean bill of lading.
(3) Copy of the Shipper Export Declaration

Each of the documents is prepared by the shipper or his agent.

The parties admit in their pleadings that in the operative tariff there is no rate classification for Diphenylmethane Diisocyanate, but there is a classification entitled "Chemicals NES" up to/including $1,500 per 2,240 lbs., item No. 510.0001.225.

Sea-Land states, "Since there is no specific commodity provision in Tariff No. (29) FMC-4, the rate clerk erroneously selected the entry reading, "Diphenyl-Packed" in Item No. 512.1216.001 of Tariff No.

(29) FMC-4 for application of the rate. The service 3 rate in Item No. 512.1216.001 was $72.50 per ton of 2,240 pounds at the time the involved shipments took place. Sea-Land also states that in addition to the erroneous selection of a rate to apply, its rate clerk overlooked completely the fact that the shipments were moving under refrigerated controlled temperature with "0–10 Degrees to be maintained" as specified on the bill of lading by the Shipper." Sea-Land contends therefore that the shipments were subject to Rule 13Q3 of the tariff plus the rates and regulations applicable to shipments moving under refrigerated controlled temperature. According to Sea-Land, the erroneous application of rate on each of the involved shipments has been corrected by Sea-Land and balance due bills issued, based on the rate of $197.00 per ton of 2,240 lbs. or 40 cubic feet published in Item No. 931.0001.109 of the tariff.

Upjohn contended that Sea-Land classified the shipments of Diphenylmethane Diisocyanate as Chemicals N.E.S. Sea-Land answered that it did not and does not admit that the shipments were classified as Chemicals N.E.S. under the entry in Item No. 510.0001.225 of the applicable Tariff No. (29) FMC 4, nor does it admit that the rates shown for that entry are applicable to the shipments. Sea-Land had stated in its answer filed October 2, 1974, that the correctly applicable rate for the shipments was $197.00 per 2,240 lbs. or 40 cubic feet, whichever results in greater revenue, in Item No. 931.000.109, applicable to General Cargo N.E.S., Temperature Controlled, up to/including 32° F. for Service 3 and cites Rule 13Q3 of the tariff. Upjohn quarrels with any application of Rule 13Q3 of the tariff.

Upjohn argued in its October 24, 1974, Memorandum of Facts and Law that it perceived no ambiguity in the tariff, relying on the Chemical N.E.S. classification in making the shipments herein. But, Upjohn urges that Sea-Land had problems in interpreting its own tariff. Sea-Land contends that its implementation of the tariff and all of its provisions is correct and that there is no element of ambiguity standing in the way.

Upjohn in a reply filed December 5, 1974, argued that a shipper is entitled to rely on the rate classification set forth in the rate section of the tariff and is not to be required to went its way through the long and tortuous rules and regulations governing the handling of cargo to ascertain whether another and different rate classification may apply.

It is interesting and possibly understandable that Upjohn does not zero in at all or deal with its instructions on each bill of lading as to the freight that temperature of 0 to 10 degrees F. be maintained, which instruction is specific, and which was one error corrected by the carrier, nor is there any reference made to the Table of Contents of

the tariff which shows Rule 10, Refrigeration or Controlled Temperature guarantees. In any event, it is concluded that within the facts and circumstances of this case, the position of Upjohn and its arguments thereon cannot prevail.

Findings and Conclusions

Upon consideration of the entire record in these proceedings, the pleadings, the memoranda of facts and law, the arguments and an appraisal of the claims through consideration of facts, and the applicable law, the Presiding Administrative Law Judge *finds and concludes,* in addition to the findings and conclusions hereinbefore stated:

1. There is no ambiguity in the tariff in question under the facts and circumstances herein.

2. Upjohn is not entitled to an award of reparation, and its request for reparation should be denied.

Wherefore, it is ordered, subject to review by the Commission on appeal, or upon its own motion as provided in the Commission's Rules of Practice and Procedure, that:

(A) Upjohn's claim for reparation, be and hereby is denied.

(B) Sea-Land shall promptly and fully inform and advise the Commission of the receipt or non-receipt of payments due to it by virtue of the undercharge herein, and, if necessary, shall pursue to collect the same in the appropriate legal forum, again keeping the Commission promptly and fully advised so that Sea-Land and the Commission can meet the on-going responsibility imposed by the Shipping Act, 1916.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
January 9, 1975.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–54

PACIFIC WESTBOUND CONFERENCE—APPLICATION TO EXTEND ITS EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT SYSTEM TO INCLUDE ITS OCP TERRITORY

Application of Pacific Westbound Conference to amend its dual rate contract so as to include overland common point territory approved pursuant to section 14b of the Shipping Act.

Canadian ports are properly included within the Pacific Westbound Conference's organic agreement. There are no jurisdictional or policy reasons for not including Canada in dual rate contracts.

Section 5 of the Federal Trade Commission Act has no application to the Conference's proposed amendment of its dual rate contract.

Edward D. Ransom for the Respondents, Pacific Westbound Conference and member lines.

Jacob P. Billig and *Terrence D. Jones* for intervener, Fesco Pacific Lines, Inc.

John P. Meade for intervener, Hoegh-Ugland Auto Lines.

George F. Galland and *William Karas* for intervener, Outboard Marine Corp.

Seymour H. Kligler and *David R. Kay* for intervener, American West African Freight Conference

Donald J. Brunner, Charles L. Haslup, III, and *Marilynn Goldsmith* as Hearing Counsel.

REPORT

Decided Mar 27 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett and Clarence Morse, *Commissioners*)

This proceeding was instituted by the Commission pursuant to an Order of Investigation and Hearing to determine whether the applica-

tion of the Pacific Westbound Conference (PWC) to amend its exclusive patronage (dual rate) contract to include the Conference's Overland Common Point (OCP) territory (No. 57 DR-4) should be approved, disapproved or modified pursuant to section 14b of the Shipping Act, 1916.

Prior to going forward with a hearing, the then parties to this proceeding agreed to file briefs regarding suggested issues of law. Administrative Law Judge John Marshall made rulings on the legal issues. The Commission in its Order on Remand, stated that the issues raised in its Order of Investigation could be resolved only on the basis of a full evidentiary hearing. The Commission also stated that the hearing should encompass, *inter alia*, the issues of (a) inclusion of Canadian ports within PWC's organic agreement, and (b) the applicability of section 5 of the Federal Trade Commission Act to the proposed amendment of the Conference's dual rate system.

Hearings have been held and Administrative Law Judge Charles E. Morgan issued an Initial Decision approving the application of Respondent. Hearing Counsel and intervenor Outboard Marine Corp. (OMC) filed exceptions to the Initial Decision, to which Respondent Pacific Westbound Conference (PWC) replied.[1] While Fesco Pacific Lines, Inc. (Fesco), Hoegh-Ugland Auto Liners and the American West African Freight Conference were granted leave to intervene, and did participate in the proceedings below, they did not file exceptions. Oral argument was granted and heard.

BACKGROUND

The Pacific Westbound Conference came into being when its Agreement No. 57 was approved in 1923. The PWC carriers serve the full range of Pacific Coast ports of Canada, Washington, Oregon, and California, and the full range of ports in the Far East. The Conference agreement also encompasses Siberia and China, but these areas are not presently served.

The Far East Conference (FEC) operates out of the Atlantic and Gulf Coasts of the United States to Far East ports. There are 21 members of PWC and 17 members in FEC. Fourteen of the seventeen FEC carriers are also members of PWC. The FEC and PWC, pursuant to Commission approved Agreement No. 8200–2, may confer and agree

[1]The number of parties has dwindled from time to time. The original Order of Investigation listed as petitioners, Allis Chalmers (International Division), American Cotton Shippers Association, the Port of New York Authority, Minnesota Mining and Manufacturing Company, Orient Overseas Container Lines (OOCL), Caterpillar Tractor Co., and American Hoist & Derrick Co. All of these petitioners have withdrawn as parties to this proceeding.

In addition, certain intervenors withdrew as parties, including the Maryland Port Authority, the Port of Galveston, the Board of Commissioners of the Port of New Orleans, the New Orleans Traffic and Transportation Bureau, and the New Orleans Board of Trade, Ltd.

on rates, rules, regulations, and differentials affecting the PWC and FEC local tariffs of rates. By the terms of that agreement the PWC overland tariff is specifically excluded from its coverage, and, even as to the covered areas, each conference retains the right of independent action.

From its inception PWC has had both a local and overland tariff of rates, the latter applying to cargo which originates at points east of the Rocky Mountains and which moves under through export bills of lading. Overland tariff rates generally are lower than, but never higher than, local tariff rates.

PWC currently has exclusive patronage contracts with approximately 8,000 shippers covering the local traffic area. The current PWC shipper contract is of the standard form approved by the Commission in *The Dual Rate Cases,* 8 F.M.C. 16 (1964). The amendment proposed in this proceeding would eliminate language restricting the contract to the local tariff, and thereby extend the contract to include the overland tariff. No change whatever is made in the basic provisions of the contract. The proposed dual rate contract would apply to only the PWC water rates, not to the rail or motor carrier rates.

Earlier in this proceeding PWC proposed to amend Article 2(b) of its contract so as to make more clear the meaning of the natural routing clause. The Commission approved that amendment.

The proposed PWC contract states that the noncontract rates are higher than the contract rates by 15 percent of the contract rates, which makes the actual spread under the PWC contract to be about 13 percent of the noncontract rates. In other words, if approved, the proposed PWC exclusive patronage contract would make the present overland rates the contract rates and the new noncontract rates would be higher than the present overland rates by 15 percent of those overland rates.

The PWC chairman stated that he did not expect much movement under the noncontract overland rates because his experience indicated that most shippers sign the exclusive patronage contract, and, consequently, would ship their cargo at the lower contract rates. The chairman further stated that the reason PWC had not previously made its contract rate system applicable to its overland tariff was that, until recent years, nonconference carriage was of a sporadic nature, consisting mainly of tramp or chartered vessels catering principally to bulk cargoes.

The fleets of the 21 regular members of the PWC are made up of containerships, semicontainer ships, breakbulk ships, and LASH ships. The number of PWC vessels has been steadily increasing. In addition, the PWC members have introduced new vessels to replace old vessels.

The new vessels include SL-7's introduced by Sea-Land, and LASH vessels introduced by Pacific Far East Lines. American Mail Lines and American President Lines have converted to containers. The Japanese carriers, as a consortium, have introduced new, large, fast container vessels. States Steamship Company, which has laid up three of its thirteen ships, has contracted for modern roll-on roll-off vessels. The total sailings by PWC vessels from the major Pacific Coast ports served by PWC were 1,624 in 1970, 1,307 in 1971, and 1,519 in 1972. Due to the modernization of the PWC fleet breakbulk sailings diminished from 1,383 in 1970 to 970 in 1972, while containership sailings increased from 241 in 1970 to 549 in 1972.

Nonconference competition in the Pacific westbound trade has increased greatly. As of May 4, 1972, the competition included twelve regularly advertised nonconference carriers and seven irregular carriers. The principal nonconference competition in the trade includes the Russian owned Fesco Pacific Lines, Inc.,[3] Orient Overseas Container Lines, its affiliate Orient Overseas Lines (OOL), and two specialized auto carriers, Wallenius Line and Hoegh-Ugland Auto Liners.

Fesco is a regular liner carrier wholly owned by the government of the USSR. Between January 1971 and the middle of 1973, Fesco increased its fleet from seven breakbulk vessels to sixteen vessels by adding seven containerships and two breakbulk vessels. Those vessels provide weekly service to Japan and Hong Kong.

OOCL increased its service from three to seven containerships between December 1969 and June 1973, and provides weekly service to Japan, Taiwan and Hong Kong.

Wallenius Line is a Swedish flag contract auto carrier which provides three to four sailings per month from the Pacific Coast to Japan and Korea.

Hoegh-Ugland Auto Liners is a Norwegian flag joint service operating highly specialized roll-on roll-off vessels designed for the carriage of automobiles and other set up rolling stock. It entered the trade in 1970 with five vessels. It has increased its service to eight vessels, and is about to add a ninth. Those vessels each have a carrying capacity of between 3,000 and 4,000 economy sized cars, or about 2,000 full sized cars. It offers about two sailings per month, featuring quick turnaround.

PWC made a space survey of the periods of January through April in both 1971 and 1972. That survey showed free space available for cargoes on 13 of the 21 conference lines of 599,192 measurement tons in the 1971 period and 683,460 measurement tons in the 1972 period.

[3]When the instant application was filed Fesco had not yet entered the trade.

In 1965 the 21 conference lines carried 14,475 revenue tons of unboxed autos under the overland rates. In 1972 that figure had dropped to 193.5 revenue tons. In comparison with the specialized auto carriers, the conference lines handle automobiles by pushing them into containers or carrying them in the holds of the vessels. Coast Guard safety orders prohibit the carriage of fueled autos in containers unless those containers have specialized air vents.

While the PWC provides service for a full range of cargoes, including low rated items, Fesco has not named rates on "low rated" commodities. The Fesco overland tariff contains only 25 items, while the PWC tariff lists 100. However, Fesco and OOCL vigorously compete with the Conference for traffic in the relatively high rated commodities.

Overland cargo is generally high rated, high valued, containerized cargo. PWC's local cargo is generally low value, low rated, volume bulk cargo.

Fesco did not make any concerted effort to acquire overland cargo in 1971 because it was not until December of that year that Fesco set up agents throughout the midwest and east to solicit such cargo. All of Fesco's overland cargo is containerized. In the last quarter of 1972, Fesco carried 13,191 revenue tons of containerized overland cargo, which was 25 percent of Fesco's total containerized cargo. For 1973, Fesco anticipated a good year, at least comparable to 1972.

Fesco's rate policy, according to a representative-witness, is to balance the needs of its shippers against Fesco's costs, while remaining competitive with the PWC and OOCL. Of paramount concern to Fesco is the need to remain competitive with OOCL, thus, if OOCL reduces the rate on a commodity, Fesco does so also.

One exhibit of record in this proceeding compares the overland rates to Japan and Hong Kong effective August 13, 1973, of PWC, Fesco and OOL on nine high-rated commodities, namely, Agricultural Implements, Air Conditioning Units, Bowling Balls or Pins, Brake Fluid, Cargo N.O.S., Chemicals Non-Hazardous, Cigarettes, Feed, Poultry-Stock, and Insecticides, and indicates that nonconference rates are, on the average, 21 percent below the conference rates.[3]

For example, on Agricultural Implements the PWC rates to Japan and Hong Kong, respectively, are $88.25 W/M and $81.86 W/M. Comparable rates of Fesco and OOL are $54.50 W/M and $53.00 W/M, or 38 and 35 percent, respectively, below conference rates. On Air Conditioning Units, PWC rates are $62.43 and $70.38. Comparable OOL rates are $47.25 and $49.50, or 24 and 30 percent, respectively, below conference rates.

[3]PWC rates include surcharges to Japan and Hong Kong.

In addition to its low rates, Fesco entices cargo by paying 2.5 percent freight forwarder compensation. The PWC lines pay 1.25 percent.

The PWC chairman asserted that many of the conference lines are experiencing financial difficulties. Pacific Far East Lines is reported to have lost $7,000,000 in the first half of 1973. American Mail Lines and American President Lines have merged. The Conference chairman further stated that if the PWC dual rate contract is not extended to the overland territory, then the Conference members must meet the nonconference competition head on. In the view of the Conference chairman that would result in a rate war, which would ultimately result in the demise or departure of several of the member lines.

The Commission's files disclose that a number of conferences presently have on file contract/noncontract rates applicable both to local and overland tariffs, including the Philippine North America Conference, Agreement 5600 (successor to Associated Steamship Lines Manila), the Transpacific Freight Conference (of Hong Kong), Agreement 14, and the Pacific Coast Australasian Tariff Bureau, Agreement 50.

DISCUSSION

The Administrative Law Judge concluded that the application of Respondent should be approved. We agree with that conclusion, but not all of the methods used or all of the intermediate steps traversed to reach that conclusion. The basis of our decision is set forth below.

No exception was taken to nor was any argument made before the Commission regarding the Initial Decision on the (a) Canadian ports issue or the (b) question of the applicability of section 5 of the Federal Trade Commission Act. We adopt so much of the Initial Decision as deals with those issues. Those portions of the Initial Decision herein which deal with the Canadian ports issue and the applicability of section 5 of the Federal Trade Commission Act are attached hereto as an Appendix and are incorporated herein by reference.

Both OMC and Hearing Counsel except to the ultimate conclusion of the Administrative Law Judge and to several specific conclusions and findings reached in support thereof. We shall treat the specific exceptions first.

OMC asserts that the Administrative Law Judge erred, "In finding that 'the conference carriers have provided the best all-around services for shippers in the trade.' " We do not agree. The specific finding challenged by OMC can only be read so as to mean that the Conference carriers combined provide a greater variety in the types of ves-

sel, in the ports of call, in the types of cargo carried, and a greater frequency in sailings than do the nonconference carriers. The record amply supports such a conclusion. The president of Fesco testified that its service is not superior to the combined service of PWC. The PWC made 1,624 sailings in 1970, 1307 sailings in 1971, and 1,519 sailings in 1972. Two exhibits admitted into evidence in this proceeding show the nonconference services in the PWC trading area. Those exhibits show that in 1972 and 1973 Fesco made some 66 and 101 sailings, respectively. In those same years, OOL and OOCL combined made some 65 sailings each year. Fesco serves only Japan and Hong Kong, and OOL and OOCL serve only Japan, Hong Kong, Korea and Taiwan. PWC, on the other hand, serves Japan, Hong Kong, Korea, Taiwan, Viet Nam, Cambodia, the Philippines and Thailand. The PWC overland tariff listed 100 items while the Fesco overland tariff named only 25.

OMC also asserts that the Administrative Law Judge erred,

> In finding that overtonnaging in the PWC trade supports approval of the contract, without inquiry into the cause of overtonnaging, or into the effect of his decision on the continuance of overtonnaging.

Likewise, Hearing Counsel assert in their exceptions that, "There is no probative evidence that the trade is overtonnaged."

These exceptions arise as a result of Judge Morgan's separate findings that "The trade is grossly overtonnaged and PWC lines are hurting seriously", and:

> The PWC trade is greatly overtonnaged. This view has been publicly stated by top officials of the United States and of the Japanese Ministry of Transport. Not only are the nonconference carriers increasing their capacity, but so are the Conference carriers. Conversion from old-fashioned break-bulk type of ships to modern containerships apparently has caused overtonnaging to a considerable extent, as well as the entrance of Fesco, . . . and the expansion of the fleets of nonconference carriers.

Hearing Counsel make much of the Administrative Law Judge's reference to comments on overtonnaging made by officials of the United States and Japan. That reference, however, is not necessary to the decision in this case, and it does not appear that the Administrative Law Judge relied heavily upon these officials' views. In any event, there is ample evidence in the record to show that, at the time the record was closed, the trade was in fact overtonnaged. In this regard, we also reject Hearing Counsel's contention that PWC's survey, which revealed 599,192 measurement tons of free space in the first third of 1971 and 683,460 measurement tons in the same period in 1972 on 13 of the 21 conference lines, does not establish that the trade is overtonnaged.

In support of their assertion that the survey results must be ignored, Hearing Counsel argue that the free space figures arrived at therein are not related to the total capacity, and are not identified as to container capacity as compared to breakbulk or bulk capacity. This latter criticism not only ignores the evidence of record in this proceeding but is irrelevant and immaterial, in any event, to the finding challenged, i.e. that the trade is overtonnaged.

Exhibit 6 of record sets forth by line the pertinent free space findings of the PWC survey. Addressing himself to this exhibit, Conference chairman Day identified the eight lines listed therein which were fully containerized. Using this information and a simple arithmetical process, one can easily arrive at the *container* free space in measurement tons, which in 1971 and 1972 was 521,816 and 494,479, respectively.

While there is evidence in the record as to the breakdown of free space as between container and other forms of capacity, the nonexistence of such evidence would not be critical to the matter at issue here. Those factors would contribute to a finding of the degree of overtonnaging, but overtonnaging exists if there is a substantial amount of free space on the vessel. In this case there is evidence in the record which establishes that on 62 percent of the vessels, for one-third of each year, there was a total of approximately 600,000 measurement tons of free space. Thus, by any fair reading of that evidence one must conclude that the trade is, to some degree, overtonnaged.

OMC does not appear to quarrel with the finding that the trade is overtonnaged, but asserts that Judge Morgan did not inquire into the cause of the overtonnaging, or into the effect the extension of the dual rate contract would have on remedying the overtonnaged condition of the trade. This simply is not so. To the contrary, the Administrative Law Judge did inquire into the cause of the overtonnaging, and found that it was attributable to the increase in the capacity of the Conference and nonconference carriers, including conversion from breakbulk to containerships. More importantly, however, OMC has missed the point of a finding of overtonnaging. The primary purpose for an inquiry into free space on conference vessels is to determine whether the Conference vessels will have the capacity to carry the cargo it intends to commit to itself by the implementation of an exclusive patronage contract. In that sense the overtonnaged condition of the Pacific westbound trade does support approval of an exclusive patronage contract, as it tends to establish the commercial reasonableness of the exclusive patronage practice.

Hearing Counsel take issue with the Presiding Officer's finding

that PWC lines are in financial difficulty. They argue that the record here will not support such a finding. The record does not establish that *all* PWC member lines are in financial difficulty. However, the Initial Decision, under any fair reading, does not *find* that *all* PWC lines are in financial difficulty. The Initial Decision finds that some of the lines are in financial difficulty, ". . . particularly the American flag lines." [4] The Conference chairman so testified, and it would not be improper for the Administrative Law Judge to give credence to that testimony, as the Conference chairman is in a position to know the relative strength and weaknesses of the PWC member lines. Thus, there is adequate record support for a finding that *some* of the member lines of the Pacific Westbound Conference were, at the time the record was closed, in some financial difficulty. That being so, we find Hearing Counsel's argument to the contrary to be without merit.[4]

OMC asserts that the Administrative Law Judge erred:

> In failing to find that the proposed PWC overland noncontract rates will be unjustly discriminatory between exporters from the United States and their foreign competitors.

This exception is not well taken. There is no evidence in this record to show a disparity between the rate on a commodity outbound from the United States to a foreign destination and the rate on the same commodity from another foreign country to that same foreign destination. There is, therefore, no basis for a finding that the proposed PWC overland noncontract rates will be unjustly discriminatory between exporters from the United States and their foreign competitors.

Hearing Counsel take issue with the Presiding Officer's finding that rate wars would be the alternative to approval of this application. A similar exception is proffered by OMC. In a related area, OMC contends that the Administrative Law Judge erred, "In characterizing the competition—conducted with modern ships at substantial investment —as 'very predatory.' " Judge Morgan's specific findings to which these exceptions are directed are as follows:

> If the dual rate contract is not extended to overland rates, the PWC lines must take some alternative action. They could leave the trade, or a rate war might result, but a rate war must be avoided if at all possible. (I.D., p. 15)
>
> Some of these (PWC) lines must leave the trade, engage in rate wars harmful to the shipping public, or this application to extend PWC's dual rate to overland territory must be approved. (I.D., p. 16)

[4] Hearing Counsel are in error when they assert that the Presiding Officer found that Seatrain International, S.A. is an American flag line. The *only* reference to Seatrain in the Initial Decision is to the effect that: "Seatrain is having difficulties."

We find merit in these challenges at least insofar as they attack the findings that some of the PWC lines would be *compelled* to leave the trade or to engage in rate wars if the present application were disapproved, and that the nonconference competition is very predatory. There is no evidence in this proceeding to show that the Fesco or OOCL rates are below cost, or that the PWC carriers are equally or more efficient than Fesco or OOCL, or that the rates were set to drive the Pacific Westbound Conference out of the market. Therefore, the record is insufficient to support a finding of predatory competition. Likewise, while the record supports the conclusion of the Administrative Law Judge that some PWC lines ". . . could leave the trade, or a rate war might result, . . ." that is, where the finding recognizes possibilities rather than certainties, it does not support a finding that any of the PWC lines would have no other alternative but to leave the trade or engage in rate wars. However, we do recognize that a rate war or instability in service to the shipping public is probable if the PWC application is disapproved.

Another challenge raised by OMC is that the Administrative Law Judge erred, "In finding that the PWC trade is a 'classic example' where dual rates are justified." Whatever be the merits of the finding complained of, and the exception thereto, they are clearly irrelevant to the disposition of the subject application. It does not matter whether or not the PWC trade is a "classic" example of a trade wherein a dual rate contract is justified, so long as conditions in the trade warrant the approval of such a contract. The determination as to whether a dual rate contract should be permitted in a particular trade is not one of degree. Either the conditions in the trade justify such a contract or they do not. Once the determination is made that a dual rate contract is justified in a particular trade, the *extent* to which it is justified becomes a meaningless consideration. Therefore, while the Presiding Officer's finding of "classic example" may be characterized as "overkill", it falls far short of reversible error.

The Congress, the courts, and this Commission have all recognized that dual rate contracts are permitted, where the other required considerations are met, when they are needed to maintain a viable conference. The threat to the continued useful existence of a conference which justifies a dual rate contract system is not to be limited to "fly-by-night" operators, but is to be determined by the effect upon the conference of nonconference competition from whatever type of competitor.

OMC further asserts that Judge Morgan erred, "In resting his approval of the dual-rate contract extension on the deviation of nonconference rates from conference rates." The exception is without

merit. Our reading of the Initial Decision fails to disclose any reliance by the Administrative Law Judge on the deviation of non-conference rates from conference rates as a basis for his approval of the dual rate contract extension. Such a deviation is mentioned in that portion of the Initial Decision wherein Judge Morgan treats the reasonableness of the spread between the proposed contract and noncontract rates. The Administrative Law Judge mentions the rates of the nonconference competition in other parts of the Initial Decision, but, those references go to the extent of the nonconference competition and its effect upon the conference trade.

Contrary to the assertion of OMC, the Administrative Law Judge did not, in his decision, and the Commission does not here, advance, support or approve the proposition that a conference may unreasonably elevate its rates and thereby justify a dual rate contract on the basis of the disparity between those rates and the rates of the nonconference competition. In this regard, there has been no evidence adduced herein that shows that the Conference has systematically increased its rates so as to create an unreasonable spread between its rates and those of its competition.

Both OMC and Hearing Counsel have excepted to Judge Morgan's ultimate finding and conclusion that the PWC application has been ". . . Justified By Serious Transportation Circumstances . . .", and that it should be approved. Alternatively, OMC and Hearing Counsel argue that the Administrative Law Judge erred by not requiring, if a dual rate contract for the overland territory is to be approved, that said dual rate contract be separate and distinct from the dual rate contract applicable to the local area, and by failing to consider the effect upon shippers of Agreement No. 8200–2 when implemented in conjunction with a dual rate contract applicable to the overland territory.

We come now to a discussion of the law to be applied to the evidence adduced in this proceeding, and the conclusions to be deduced therefrom. PWC presently has in force an exclusive patronage contract. By its terms that contract applies only to local cargo. The application before us would delete from that contract that language which limits the scope of the contract to cargo originating in the local area, and thereby cause the contract to be applicable to cargo originating anywhere in the United States or Canada.

Section 14b of the Shipping Act, 1916, as amended, authorizes and directs this Commission to permit the use of an exclusive patronage contract ". . . unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly dis-

criminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, . . ." and providing that the contract conforms to certain enumerated requirements, including that the contract:

(7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates. . . .

In *Investigation of Passenger Travel Agents,* 10 F.M.C. 27, 45 (1966), we held that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can:

. . . bring forth such facts as would demonstrate that the rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.

The Supreme Court, in *FMC, et al. v. Aktiebolaget Svenska Amerika Linien, et al.,* 390 U.S. 238 (1968), approved this standard for approval of Agreements under section 15 of the Act, stating that such standard, involving, as it did:

. . . an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of "the public interest". (390 U.S. 340)

The phrase "public interest", as used in section 14b of the Act, has the same meaning as does that phrase in section 15 of the Act. *Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System,* 12 F.M.C. 149, 153 (1969), *rehrg.* 14 F.M.C. 172, 185 (1970), *aff'd. sub nom., Latin America/Pacific Coast Steamship Conference v. United States,* 465 F.2d 542, 550 (D.C. Cir. 1972), *cert. den.* 409 U.S. 967 (1972).

Since the proposed extension of the Conference's dual rate contract before us here runs counter to the principles of the anti-trust laws, it is therefore contrary to the public interest, as that phrase is used in section 14b of the Act, unless the restraint is necessary to achieve some legitimate commercial objective. *Agreement No. 8660, above,* 14 F.M.C. 172, 185. We, therefore, turn to determine whether the modification proposed is necessary to secure some legitimate commercial objective or whether some lesser included restraint would achieve that objective or whether no lesser included restraint is necessary to achieve that objective.

In this case there has been evidence adduced which shows that the volume of certain high value overland cargo carried by PWC has decreased. During the same period of that decrease the volume of overland cargo carried by Fesco and OOCL has increased. There is

evidence which shows that the gross revenue received from the carriage of overland cargo formed a larger percentage of the total gross revenue received by PWC than the volume of overland cargo carried was of the total cargo carried by the Conference. There is evidence which shows that some of the Conference members are in financial difficulty. There is evidence to show that the Conference intends, unless it is permitted to implement a dual rate contract system in the overland area, to engage in a rate war with its nonconference competition.

From the year 1969 through 1972, PWC experienced a reduction in the volume of certain high revenue cargo carried from the overland territory. In 1970 those carryings were 24.8 percent less than the year before. In 1971 those carryings were 3.1 percent less than in 1970. In 1972 those carryings were 23.4 percent less than in 1971. The carryings in 1972 were 44.1 percent less than the carryings for those items in 1969. The rates on those items charged by the principle nonconference competition, OOCL and Fesco, were, on the average, 21 percent less than the PWC rates. Those nonconference carriers charged rates which ranged from 17 percent above (one item) to 45 percent below the conference rates. During the same period wherein the Conference experienced a reduction in the volume of high revenue cargo the principle nonconference competition, OOCL and Fesco, increased their fleets as follows: OOCL—from three container vessels to seven container vessels; and Fesco—from seven breakbulk vessels to nine breakbulk vessels and seven container vessels.

Fesco entered the United States Pacific West Coast trade in January 1971. It first commenced overland container operations in that trade on September 30, 1972. During the last three months of 1972 Fesco carried 54,846 revenue tons of containerized cargo, of which 25 percent was OCP cargo. All of Fesco's OCP cargo was containerized. Fesco's seven container vessels were utilized in excess of 75 percent of their capacity. If the 13,711 revenue tons of overland cargo carried by Fesco in the fourth quarter were extrapolated over an entire year, the resultant figure would be 54,846 revenue tons.

OOCL also has seven container vessels. It appears that OOCL was experiencing high utilization of those vessels, as it increased their number. OOCL carries some overland cargo, probably equal to that carried by Fesco. On the basis of the foregoing, and allowing for error, OOCL and Fesco might well have carried as much as 100,000 revenue tons of OCP cargo per year, which is approximately 20 percent of the total overland cargo carried by those carriers and the PWC carriers combined.

Overland cargo is usually rated on a measurement basis. Over the

years 1968 through 1972 overland cargo accounted for, on the average, 2.73 percent of all of the revenue tons carried by the PWC members. Notwithstanding the percentage of volume, over those same years the overland cargo accounted for, on the average, 12.37 percent of the total gross revenue received by the PWC carriers. The percentage of the total net revenue should be greater, as this cargo is high profit cargo. The value of the overland cargo to the Conference members greatly exceeds its position in space occupied.

Hearing Counsel have made much of the fact, conceded by the Conference, that the Pacific westbound trade has been historically stable, as far back as 1961. Hearing Counsel argue that that stability precludes approval of the present application, that is, the Conference has not shown that the nonconference competition has resulted in the destabilization of the services offered to shippers.

The Conference retorts that the member lines have not resorted to meeting the nonconference competition by wholesale reductions in rates, but have sought this extension to their dual rate contract as a means of meeting that competition while maintaining stability in services. The Conference asserts, however, that it cannot long continue that restraint, and that unless it is allowed to implement a dual rate contract applicable to the overland territory, it will be forced to meet the nonconference competition by reducing its rates below the nonconference level, and that it will do so.

It is proper for a conference to reduce its rates, so long as those rates are not so unreasonably low as to be detrimental to the commerce of the United States, in order to meet nonconference competition. Since Fesco's witness testified that its rates are set at all times to be competitive with the rates under which traffic moves, PWC would find it necessary, if the nonconference competition responsively reduced its rates, to further reduce its rates below those of the nonconference competition. Since several of the PWC members are in an unsound financial condition, it is probable that those members would be unable to carry the cargo at those low rates. As a result, those members would no longer provide the service to shippers presently obtaining, to the possible detriment not only of those shippers but of the commerce of the United States as well.

It is to avoid that diminution in service, or service instability, for which the dual rate contract is permitted. We will not require that the diminution in service actually occur before we will permit an action which will prevent that evil. The bare assertion by a conference that instability in service will result at some future time does not provide sufficient basis to approve a dual rate contract. However, where, as here, that assertion is circumscribed by a great reduction in the vol-

ume of cargo carried by the conference, and by vigorous nonconference competition, carried on at rates substantially below the rates of the conference, which attracts cargo, in part, by the payment of freight forwarder compensation at a rate double that paid by the conference, and which discourages the tender or refuses the carriage of low rated cargo [5] while vigorously soliciting high revenue cargo, the probability of a disruptive and destructive rate war is sufficiently enhanced to support the approval of a dual rate contract.

Because 14 of the 17 carriers who are members of the Far East Conference (FEC) are also members of the 21-member PWC, and because those 2 conferences have an approved agreement, No. 8200–2, which permits those two conferences to discuss and agree on certain rate matters, both OMC and Hearing Counsel deny that shippers in the overland territory would have any viable alternatives to shipping to the Far East via the West Coast ports of the United States. It is this relationship between the two conferences which, according to those parties, causes the dual rate contract now proposed to be so anticompetitive as to outweigh any transportation need possibly shown by PWC. Whether or not Agreement No. 8200 shall be continued in force is the subject of another proceeding before this Commission in Docket No. 74–41, *Agreement Nos. 8200, 8200–1, 8200–2 and 8200–3 Between the Pacific Westbound Conference and the Far East Conference.* In that proceeding the PWC and FEC have the burden of showing that, in all of the circumstances, including the existence of a PWC dual rate contract applicable to the overland territory, Agreement No. 8200, as amended, is not contrary to the public interest, as that phrase is used in section 15 of the Act. We reserve consideration and decision on the interaction of Agreement No. 8200, as amended, with the PWC overland dual rate contract for Docket No. 74–41.

At present PWC has a dual rate contract applicable to the local area, but none applicable to the overland territory. The application before us would, if approved, cause there to be one dual rate contract applicable to both the local and overland territories without differentiation. It has been asserted by both OMC and Hearing Counsel that, if the Commission is to approve any dual rate contract applicable to the overland territory, that contract must be separate from the contract applicable to the local area. It is argued that one contract is more restrictive than separate contracts, and that separate contracts are sufficient to meet the asserted needs of the Conference. We disagree.

At present, excluding other coast options, a shipper in the over-

[5] Fesco's Cargo, N.O.S. rate is approximately 50 percent higher than its commodity rates.

land territory may sign the PWC local contract and ship goods to the Far East via nonconference overland tariffs or via the Conference local contract rates. If there were to be instituted separate contracts for the local and overland territories, that overland shipper would have the option of signing the local PWC contract, but not signing the PWC overland contract, and ship goods to the Far East via the nonconference overland tariffs or via the PWC local contract rate, in other words, the same option that the shipper now has. If it is recognized that the Conference has demonstrated a need to bind the overland cargo to itself, then separate contracts would not fill that need.

In sum, the extension to the PWC dual rate contract under consideration here can only be approved if it is found necessary to achieve some legitimate commercial objectives. As we said in *Agreement No. 8660, above,* 14 F.M.C. 172, 185 (1970), in the normal run of things that legitimate commercial objective will be a conference's need to protect itself from the inroads of nonconference competition. In this case there has been sufficient evidence adduced to find that the nonconference competition, particularly OOCL and Fesco, have made substantial inroads into the sources of revenue of the Conference, and to preclude a finding by the Commission that one dual rate contract applicable to the entire Pacific Westbound Conference trade area is not necessary to protect the Conference from the nonconference inroads. Consequently, the application of the PWC will be approved.

However, the dual rate contract presently employed by the Conference binds the merchants who signed that contract only as to local shipments. The merchants may not be deprived of their rights thereunder except upon 90 days' notice. Further, the overland rates now in force may not be increased except upon 30 days' notice. Consequently, the modification herein approved shall not be effective until 90 days after the PWC has given those parties signatory to its existing merchants' rate agreement notice of the modification, and the contract, as modified, shall not be binding, as between the individual merchant and the PWC, unless both parties have indicated in writing their intention to be bound by the contract, as modified.

Commissioner George H. Hearn, dissenting.

I do not agree with the approval granted by the majority to the PWC application to extend its dual rate contract to OCP cargo.

The majority acknowledges that the proposed extension of the PWC dual rate contract is contrary to the principles of our antitrust laws and

to the public interest mentioned in section 14b unless shown to achieve a legitimate commercial objective. What is involved, therefore, is an artificial device to extend the OCP system,[6] itself a synthetic rate system "which involves a national equalization or absorption".[7] I, however, arrive at the opposite conclusion from the majority by drawing different conclusions from the same record evidence, or lack of it.

The majority decision relies primarily on one consideration with all others presented in support of it. That consideration is the probability of a rate war or trade instability if the extension of the dual rate contract is not granted. The questions must be asked, then, who will start the rate war, what will be its cause and what basis is there for such a conclusion. The answers are not hard to find.

The majority decision states as follows:

> There is evidence to show that the *conference intends*, unless it is permitted to implement dual rate contract system in the overland area, *to engage in a rate war* with its nonconference competition.

Nothing could be plainer: it is the conference which will start the rate war. One would assume, therefore, that the conference would then be responding to predatory practices on the part of the independents; but such is not the fact. The majority finds, and I agree, that there is no evidence in the record which indicates that the independent lines set their rates so as to drive the PWC out of the market. In fact FESCO (an independent carrier frequently cited by the majority) was not even in the OCP trade until after the PWC filed its application to extend its dual rate contract. Further, there is no evidence, as the majority admits, that the independent carriers (particularly FESCO and OOCL) are offering rates below cost.

I am at a loss, therefore, to find the miscreation on the part of the independent carriers which would justify rate undercutting by the conference to the extent of precipitating a rate war. The only "evidence" that there will be a rate war is the self-serving declaration of the PWC.[8] No other evidence to that effect can be found, and what remains is a thinly veiled threat by the conference.

It is true that certain high value OCP cargo has been lost by PWC members, that there has been a concomitant gain in such cargo on the part of independent carriers and that such cargo is important in the overall operations of both. What is not established, however, is that the independents are competing only for high value OCP cargo. The fact

[6]The fact that other conferences have dual rate contracts for OCP cargo is no reason to grant it here. Each case, involving a different trade, must be considered on its own merits.

[7]*Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 227, dissenting opinion of Commissioner George H. Hearn (1969).

[8]Transcript, p. 23.

is that OCP cargo is generally of high value, and that no showing was made that in overall competition the PWC carriers are more efficient than the major independents.

What we are left with is the conclusion that the OCP export trade is subject only to free and open competition, hardly an appropriate target for rate war-making.

In order to find a basis for the claimed probability of a rate war, we must, therefore, look for other evidence. The majority finds it in the overtonnaged condition of the trade. Whether such is the case is unnecessary to decide. The fact is that assuming overtonnaging does exist, it does not justify the extension of the dual rate contract.

The record shows that the independent carriers have increased the level of their service by increasing the number of ships devoted to the trade. At the same time, however, the PWC members have done the same. The majority decision acknowledges this fact and sets forth the extent of growth in conference service, including the introduction of Sea-Land's SL-7's, PFEL's LASH vessels and the new, large and fast ships of the Japanese consortia.

Consequently, what overtonnaging exists is attributable to an increase in capacity of both conference and independent carriers, and the Administrative Law Judge so found.

The majority nevertheless tries to sidestep this situation by utilizing the overtonnaging argument in a bootstrapping manner. It is argued that the purpose of proving that there is an overtonnaged condition is to show that if the dual rate extension is granted, the PWC members will have the capacity to carry the additional cargo they will get, and therefore the extension of the dual rate contract is justified. The circuity of that argument is self-evident. Its consequences are horrendous. The argument could thereafter be made that whenever a carrier has unused cargo space it could use or receive permission for whatever anticompetitive device it chooses in order to take cargo from competitors.

The inescapable conclusion is, therefore, that the PWC is not motivated by harmful conditions in the trade to which the PWC itself contributed or competitors' unfair practices. Rather the conference is trying to eliminate the effects of overtonnaging by placing the burden mainly on the independents who are only partly to blame, if indeed specific blame for overtonnaging can be assessed. No artificial device so anticompetitive as the one sought here to garner cargo is justified in such circumstances. This is especially true when the result may be to upset the forces of open competition, albeit that the carriers may all have over extended themselves and subsequently been overtaken by unforeseen economic forces.

A dual rate contract is "contrary to the public interest unless necessary to pursue some legitimate commercial objective." [9] Although ordinarily "that legitimate objective will be a conference's need to protect itself from the inroads of nonconference competition",[10]

> An important purpose of the Shipping Act is to facilitate the flow of commerce, and while it recognizes that a proper conference system can contribute to this end, it does not undertake to give the conference prior claim on all cargoes nor afford the conferences protection from all possible competition.[11]

The conference must demonstrate that the approval or extension of a dual rate contract is required under the circumstances as being in the public interest in the same manner as a section 15 agreement must be justified.[12] The mere statement or flat assertion on the part of the PWC [13] that serious trade instability will result from failure to extend its dual rate contract is not enough.[14] Self-serving speculation or prediction does not suffice in dual rate matters any more than in section 15 proceedings.[15]

Hearing Counsel and OMC contend that the extension of the dual rate contract in this case is especially anticompetitive because the PWC and the FEC are parties to Agreement No. 8200. The argument is made that the great similarity in membership of the two conferences is an additional factor outweighing the alleged benefits of the dual rate contract extension. The majority gives short shrift to this argument on the ground that Agreement No. 8200 is under investigation in another proceeding (Docket No. 74–41) and that its relevance to the dual rate matter can be dealt with there.

This postponement of a decision on the issue is like locking the barn door after the cow is gone. By the time Docket No. 74–41 runs its course, the damage from the approval given herein will be done; and the PWC will then be able to prove its assertions in Docket No. 74–41 on the basis that it had prevented the trade instability conveniently forecast in this proceeding.[16] The authority enjoyed by the PWC members through all the agreements currently approved should be sufficient to provide the conference carriers with the ability to meet independent competition.

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[9] *Agreement No. 8660-Latin America/Pacific Coast S.S. Conference*, 12 F.M.C. 149, 160 (1969).

[10] *Id.*, 160, 161.

[11] *The Dual Rate Cases*, 8 F.M.C. 16, 43 (1964).

[12] *Agreement No. 8660-Latin America/Pacific Coast S.S. Conference*, 14 F.M.C. 172 (1970), aff'd. 465 F.2d 542 (D.C. Cir. 1972), cert. denied, 409 U.S. 967 (1972); *F.M.C. v. Svenska Amerika Linien*, 390 U.S. 238 (1968).

[13] Transcript, p. 23.

[14] *Agreement No. 8660-Latin America/Pacific Coast S.S. Conference*, 12 F.M.C. 149, 158–159 (1969).

[15] *Pacific Westbound Conference*, 9 F.M.C. 403, 410 (1966).

[16] It should be noted, further, that the scope of the carriers' power in the Pacific trades is not limited to cross-membership in Agreement No. 8200, but extends to Agreement No. 8600 between the Japan/Korea-Atlantic and Gulf Freight Conference and the Transpacific Freight Conference of Japan/Korea.

For the foregoing reasons I conclude that the requested extension of the PWC dual rate contract to its OCP territory should not be approved. No proposal less offensive to the public interest is put forward; for separation of the PWC contract into OCP and local parts would result in a situation no different than the one prevailing. I would, therefore, deny the application to amend the PWC dual rate contract.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

APPENDIX

Excerpts from Initial Decision

THE CANADIAN PORTS ISSUE. The respondents, Hearing Counsel and the American West African Freight Conference are in agreement that Canadian ports are included properly within PWC's organic agreement and that there are no jurisdictional or policy reasons for not including Canadian ports in dual rate agreements. Also, the American West African Freight Conference insists there are strong reasons why Canadian ports should be included in its conference agreement and in its exclusive patronage (dual rate) systems.

In *The Dual Rate Cases,* 8 F.M.C. 16, page 43 (1964), consideration was given to the geographic scopes of the dual rate contracts. Some contracts required merchants to promise exclusive patronage from or to ports on one of the United States coasts and contiguous ports in Canada or Mexico. The argument was made, because the Commission has no direct jurisdiction over non-United States commerce, that Canada and Mexico should not be included in the contracts presented for approval. The argument was rejected, and the Commission stated that if merchants were permitted to obtain lower rates by promising their exclusive patronage only from or to United States ports, they could easily use nonconference vessels from or to nearby Canadian or Mexican ports and honor the contract only when it met their convenience.

In 1959, in *Oranje Line et al. v. Anchor Line Limited et al.,* 5 F.M.B. 714, 728–729, it was held that where the section 15 agreements cover both the foreign commerce of the United States and also the intimately related foreign commerce of Canada, our jurisdiction under section 15 exists.

In the present proceeding approval of the Canadian port inclusion will tend to insure that similarly-situated shippers are quoted equal rates. Of course, nothing this Commission could do would usurp the jurisdiction of the Canadian government within its own territory and over its own ports, and if the ocean carrier members of PWC were to violate Canadian law, it would be no defense that the dual rate agreement is sanctioned by this Commission. Furthermore, PWC points out on brief that there presently is no possibility of conflict with or violation of Canadian law. The dual rate contracts must be filed with the

Canadian Transport Commission, but these contracts do not require approval in Canada.

The American West African Freight Conference showed in the case of its African trade that exclusion of Canadian commerce from its agreement might well result in the dissolution of that Conference or alternatively it might result in an injurious rate war.

PWC's basic Agreement No. 57 covers the trade between the West Coast of the United States and Canada, and the Far East. Canada has been included since 1923 when the Conference was organized.

It is concluded and found that Commission jurisdiction over dual rate agreements and organic conference agreements which include Canadian ports has been established. There are no jurisdictional or policy reasons for not including Canada in dual rate contracts.

THE QUESTION OF THE APPLICABILITY OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT. Both the respondents and Hearing Counsel agree that section 5 of the Federal Trade Commission Act has no application whatever to the conference agreement or the dual rate contract. An argument was made in this proceeding by one of the parties which has withdrawn from the proceeding that if the dual rate contract were approved it would constitute unfair methods of competition under section 5 of the Federal Trade Commission Act, 15 U.S.C.A. 45(a)(1), and further that neither section 15 nor section 14b of the Shipping Act would exempt the parties from the alleged violation of the Federal Trade Commission Act since that statute is not named specifically in the antitrust exemption in the Shipping Act. This argument overlooks other references in section 15.

The antitrust exemption provision of section 15 (which includes section 14b contracts) specifically refers to the Sherman Antitrust Act by citation and also refers to amendments and acts supplementary to the Sherman Act. The Federal Trade Commission Act was passed after the Sherman Act, and the Federal Trade Commission Act supplements the Sherman Act. The Federal Trade Commission Act was intended to remedy deficiencies in the Sherman Act. *Menzies v. Federal Trade Commission,* 242 F.2d 81, 83 (4th Cir. 1957).

It is concluded and found that the power of the Federal Maritime Commission to grant immunity from antitrust acts makes section 5 of the Federal Trade Commission Act inapplicable to the proposed amendment of the dual rate contract herein..

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-54

PACIFIC WESTBOUND CONFERENCE—APPLICATION TO EXTEND ITS EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT SYSTEM TO INCLUDE ITS OCP TERRITORY

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof;

It is Ordered, That pursuant to section 14b of the Shipping Act, 1916, Respondent's Merchants Rate Agreement No. 57 DR-4 is approved.

It is Further Ordered, That the modification herein approved shall not be effective until 90 days after Respondent has given those merchants signatory to its existing Merchants Rate Agreement notice of the modification herein approved.

It is Further Ordered, That Respondent's Merchants Rate Agreement No. 57 DR-4 shall not be binding, as between the individual merchant and Respondent, unless both have indicated to each other in writing their intention to be bound thereby. By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 290(I)

P.P.G. INDUSTRIES, INC.

v.

ROYAL NETHERLANDS STEAMSHIP CO.

ADOPTION OF DECISION

Apr. 4, 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman. Commissioners* Ashton C. Barrett and Clarence Morse, concurring. *Commissioner* George H. Hearn, concurring.)

This proceeding was initiated by complaint filed by P.P.G. Industries, Inc. (PPG), alleging overcharges by Respondent Royal Netherlands Steamship Co. (RNS) on a shipment of plate glass from New York, New York to Port of Spain, Trinidad. The parties consented to use of an informal procedure pursuant to Rule 19 (46 CFR 502.301–304) and the claim was heard initially by Settlement Officer Frank L. Bartak. Mr. Bartak dismissed the complaint of PPG on the ground that Complainant had failed to sustain the burden of proof necessary for recovery. Thereafter, on its own motion, the Commission determined to review the proceeding. On review, the Commission determined that certain issues detailed below had not been fully explored by the Settlement Officer. In order to permit a further consideration of these issues, the Commission remanded the proceeding to the Settlement Officer with instructions. Thereafter, having considered the issues as instructed by the Commission, Settlement Officer Bartak again dismissed the complaint. The proceeding has come before the Commission on that determination.

FACTS

On July 31, 1970, Respondent's vessel MARON sailed from New York, New York, carrying the cargo in issue bound for Port of Spain, Trinidad. The cargo involved consisted of 14 cases of plate glass and its carriage was governed by the provisions of the Leeward & Windward Islands & Guianas Conference Tariff. The freight charges levied upon these 14 cases of plate glass were prepaid and were based upon a total measurement of 924.8 cubic feet. This measurement appears on both RNS' dock receipt and on the bill of lading. The dock receipt, dated July 27, 1970, shows the following outside measurements and total cubic foot measurement:

10 cases each measuring 10'5" × 7'5" × 10"
4 cases each measuring 11'5" × 7'5" × 10"
Total measurement—924.8 cubic feet

Certain other documents show exterior measurements but do not show total cubic foot measurement. PPG's export weigh sheet (undated) lists 14 cases each measuring 126" in length and 90" in width but does not show any cubic foot computation. Freight was assessed by RNS on 925 cubic feet at $58.50 per 40 cubic feet plus surcharge. PPG challenges this assessment, alleging that the freight should have been assessed on 735 cubic feet, resulting in the alleged overcharge of $305.66.

PPG alleges that all 14 cases of plate glass were of identical size. However, this allegation is not without equivocation. PPG stated in its "Condensed Statement of Facts and Actions" that:

> . . . the packages we used are ***normally standard*** unless the client requests special packaging to meet his own specifications. No special packaging instructions were received with . . . [the order at issue].

Additionally, confusion was compounded by PPG's commercial invoice which shows only the glass plate measurement (120" × 84") but no exterior case measurement.

RNS defended against this alleged overcharge by relying upon its dock receipt figures and a tariff rule which allows the carrier to deny claims based on challenged measurements filed after the cargo has left the carrier's custody.[1] Since, without dispute, PPG filed its initial claim against RNS on May 20, 1971, RNS denied the claim based upon the six-month tariff rule limitation.

[1]Item 105 of Leeward & Windward Islands & Guianas Conference Tariff provides:
Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description *may* be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found. (Emphasis added).

Settlement Officer Bartak dismissed the complaint of PPG on the basis that, while a tariff rule such as that sought to be relied upon here by RNS cannot time-bar a complaint timely filed under section 22, Shipping Act, 1916, the Complainant had simply not sustained its burden of proof.

Our purpose in reviewing that decision was to ascertain what impact, if any, our decision in *Kraft Foods v. Moore McCormack Lines, Inc.* (Docket No. 73–44, report issued March 26, 1974) might have upon the proceeding. In *Kraft,* we permitted a carrier to rely in its defense upon a similar rule holding that in cases of alleged error in weight or measurement, the failure of a claimant to comply with an applicable tariff rule precludes recovery. In *Kraft,* the tariff rule at issue provided:

> Claims for adjustment of freight charges, if based on alleged errors in . . . weight and/or measurement, *will not be considered* unless presented to the carriers . . . before shipment involved leaves the custody of the carrier.[2]

There, the rule, in fact, provided a rule. Reliance by the carrier on that rule left him no alternative course but to refuse to consider a claim based on alleged measurement error filed after this shipment had left his possession. In the present case, whether or not a carrier would entertain a claim based on alleged error in measurement is discretionary. The carrier *may* decline to consider such a claim, but need not, at his discretion. Recognizing the possibility under such a rule of unequal treatment among shippers, the Commission determined to remand this case with directions to the Settlement Officer to ascertain the practices of the conference carrier in regard to the rule. We ordered the Settlement Officer to ". . . learn whether or not RNS has, in fact, consistently relied upon this rule in past claims of the sort provided here . . ." in denying similar claims. We so ordered so that we could determine whether or not RNS was justified in relying upon this rule and whether or not we could permit such reliance here as we did in *Kraft Foods.*

On remand, Settlement Officer Bartak found that RNS had apparently consistently denied such claims on the basis of the tariff rule sought to be relied on here. Additionally, Mr. Bartak found that Complainant PPG had no evidence that RNS had not consistently applied this rule in its handling of claims. Mr. Bartak concluded, therefore, that: (1) RNS was justified in relying upon the rule; (2) PPG had failed to establish with reasonable certainty and definiteness the validity of the claim; and (3) that PPG had not met its burden of proof notwithstanding RNS reliance on the tariff rule in question.

[2]South and East Africa Conference Southbound Freight Tariff No. 1, FMC No. 2, original p. 110, Rule 16.

CONCLUSION

Having reviewed the decision on remand of Settlement Officer Bartak, this Commission has determined to adopt the findings and conclusions included therein. We agree that while RNS is here justified in relying upon its conference tariff rule Item 105, even were it not so justified, Complainant has not sufficiently shouldered its heavy burden of proof to permit it to recover the alleged overcharges.

The Decision on Remand of Settlement Officer Bartak is, therefore adopted as the decision of the Commission and is attached hereto and made a part hereof.

Commissioners Ashton C. Barrett and Clarence Morse, concurring.

The proceeding was remanded for the sole purpose of ascertaining whether the carrier, in view of the discretionary wording of Item 105 of the Tariff, had in the past consistently applied the tariff rule to deny claims of the kind involved in this proceeding.

The Settlement Officer found that RNS had consistently applied the tariff rule and had denied claims for the adjustment of weight and measurements belatedly submitted.

In light of *Kraft Foods,* 14 SRR 603 (Docket No. 73–44, report served March 26, 1974; reconsideration denied, December 13, 1974), we conclude that we need go no further, for PPG's failure to comply with the requirements of Tariff Item 105 bars recovery.

The Settlement Officer's conclusions that PPG has not established "with reasonable certainty the validity of its claim" (Finding No. 1) and has failed to sustain the burden of proof (Finding No. 2) are therefore irrelevant for the disposition of PPG's claim.

In adopting the Decision on Remand we would rest our decision on Finding No. 3 and delete Findings No. 1 and No. 2 as irrelevant and inconsistent with Finding No. 3.

Commissioner George H. Hearn, concurring:

I concur in the result and would uphold the original decision of the Settlement Officer served March 4, 1974. My view of this case is based upon my separate opinion in *Economics Laboratory, Inc. v. Prudential Grace Line,* Informal Docket No. 301(F), decision served March 20, 1975.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 290 (I)

P.P.G. INDUSTRIES, INC.

v.

ROYAL NETHERLANDS STEAMSHIP CO.

Reparation denied.

DECISION ON REMAND OF FRANK L. BARTAK, SETTLEMENT OFFICER.

On May 16, 1974 the initial decision in this informal docket was remanded to the Settlement Officer, for him to obtain and consider information concerning Respondent's application of a tariff rule, Item 105 "Adjustment of Freight Charges" contained in the Leeward & Windward Islands & Guianas Conference Tariff.

This proceeding concerns a claim of PPG Industries, Inc. (PPG) for $305.66 against Royal Netherlands Steamship Company (RNS) for an alleged overcharge of freight on a shipment of 14 cases of plate glass from New York to Port of Spain, Trinidad on the vessel MARON. Claimant alleges that the shipment measured 735 cubic feet and that freight was erroneously assessed on a measurement of 925 cubic feet. Initially the RNS denied the claim on the grounds that it had not been submitted within six months of sailing. Subsequently the claim was also denied on the grounds that the carrier had not been offered the opportunity to have the cargo remeasured at the port of discharge.

By the initial decision PPG was denied reparations on the grounds that PPG had failed to establish with reasonable certainty and definiteness the validity of its claim and that it had not borne the heavy burden of proof required of an overcharge-claimant once the shipment has left the carrier's custody.

Because of the discretionary nature of the tariff rule,[1] which then

[1]Item 105 of Leeward & Windward Islands & Guianas Conference Tariff provided:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description *may* be declined unless application is submitted in writing sufficiently in advance to permit reweigh-

provided that the carrier "may" decline adjustment of freight claims, the Commission in its Order of Remand stated in part as follows:

". . . In order to determine whether or not respondent RNS is entitled to rely upon the 'rule' applicable here, it is a prerequisite that we learn whether or not RNS has, in fact, consistently relied upon this rule in past claims of the sort provided here. If past treatment of such claims can be shown to have been consistent either one way or another, such showing would go a long way toward showing the 'rule' to be a rule. We are therefore remanding this proceeding with directions to obtain the requisite data as to similar claims and their treatment in the past by RNS." [2]

Pursuant to the Commission's Order Respondent submitted information (data) concerning the application of the tariff rule which supports its position that it denied claims in accordance with tariff regulations as time-barred and as filed too late for an outturn measurement. However, since its practice in some instances was to deny claims on the grounds that RNS could not make an adjustment without authorization from the Conference or, in other instances, to suggest to the claimant that he refer the matter to the Conference office for Conference decision, we also requested information as to how the Conference applied the rule in question. With respect to the Conference's application of the rule, Respondent replied in part as follows:

"In connection with this matter, we have found that in mostly all cases, the Conference has declined authorization of adjustment on the basis of regulations incorporated in the various Tariffs. We can find no recent instance where the Conference office has authorized adjustment of a time barred claim, and we believe it is their standard rule to abide by Tariff regulations."

PPG was advised of the information submitted by RNS and was offered an opportunity to submit evidence whether RNS had or had not consistently relied upon the rule in past claims of the sort involved in this proceeding. PPG replied that it has no evidence that RNS has not consistently relied on tariff rules in its handling of claims.

PPG did comment on the Commission's Order in part as follows:

"We note that the FMC gives emphasis to our CONDENSED STATEMENT OF FACT AND ACTION that . . . the packages we use are *normally* standard . . . and this, we feel, was misleading to you. Namely, it opened a question as to how the packaging was on this shipment; standard or outside our normal practices.

"Our export weigh sheet confirms that no special instructions were received and that normal (standard) packaging was employed. Further, it is inconceivable that since our packaging shows a uniform weight of 1674 pounds per case and this weight was not disputed by the carrier that the shipment should have two sets of measurements . . ." [3]

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ing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found." (Emphasis added)

[3]Effective July 22, 1974, Item 105 of the Conference Tariff was modified by the word "will" being substituted for the word "may". Accordingly, the tariff rule is no longer discretionary.

While the Item 105 of the Leeward & Windward Islands & Guianas Conference Tariff is no longer a discretionary rule, the treatment of claims of the sort considered here under, the rule then in effect is still relevent to this proceeding.

From the evidence submitted, it would appear that the tariff rule was consistently relied upon. Also this Settlement Officer finds no substantive basis on which to reverse his initial decision.

Upon reconsideration as directed by the Commission, the Settlement Officer finds:

1. PPG has failed to establish with reasonable certainty and definiteness the validity of its claim.
2. PPG has not borne the heavy burden of proof required of it, as an overcharge-claimant in this proceeding, once the shipment has left the carrier's custody.
3. RNS is entitled to rely on Item 105, as previously constituted, and to decline adjustment of the claim in this proceeding on the grounds that the claim was not submitted in time to permit remeasuring before the cargo left its possession.

PPG's claim for reparation continues denied.

(S) FRANK L. BARTAK,
Settlement Officer.

[3]PPG's undated export weigh sheet shows each of the 14 cases in the shipment weighing 1675 pounds and having uniform outside case measurements of 126" × 90" × 8". The dated and signed dock receipt does not show individual case weights but does show ten cases having outside measurements of 10'3" × 7'5" × 10" and four cases having outside measurements of 11'3" × 7'5" × 10".

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 295(I)

STAUFFER CHEMICAL CO.

v.

ROYAL NETHERLANDS STEAMSHIP CO.

REPORT

Decided Apr 4 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* George H. Hearn, *Commissioner. Commissioners* Ashton C. Barrett and Clarence Morse, concurring.)

Complainant filed its complaint before the Commission alleging a misapplication of rates by Respondent and seeking reparation for the alleged overcharge. By consent of the parties, this case was heard under Subpart S of the Commission's Rules of Practice and Procedure as an informal adjudication of small claims.

Settlement Officer Waldo R. Putnam issued his decision awarding reparation, and thereafter the Commission timely issued notice of its intention to review the proceeding.

FACTS

Complainant shipped its cargo aboard Respondent's vessel ADONIS from New Orleans, Louisiana to Port of Spain, Trinidad pursuant to terms of the Leeward & Windward Islands & Guianas Conference tariff on August 22, 1970. The Bill of Lading and the Export Declaration both describe the cargo shipped as "500 Bags, Sodium Pyrophosphate" weighing 50,500 pounds.

To this shipment, Respondent applied the class 8w rate of $46.50 per 2000 lbs, provided for on 10th revised page 64 of the tariff. However, at the time of shipment 10th revised page 64 also provided a reduced rate (6w) of $42.50 per 2000 lbs., which may be seen to have

been effective through November 12, 1970. The complete provision reads as follows:

SODA OR SODIUM, Viz.:
Acid pyrophosphate, in bulk in bags, barrels or drums 8w[class No.]

(R)*Acid Pyrophosphate, in bulk in bags barrels or drums 6w[class No.]
*Expires November 12, 1970

The class 8w rate was $46.50 per 2000 lbs. while the 6w rate was $42.50 per 2000 lbs.

On April 7, 1972, Complainant filed a claim with Respondent for the difference between the two rates quoted above. By letter of May 8, 1972, Respondent rejected this claim as having:

> . . . been filed beyond the time specified by the covering conference, and furthermore the bill of lading did not specify the cargo as being Sodium Acid Pyrophate [sic] as is required in order to receive the class 6w rate.

It is of note that in this reply and rejection Respondent did not specify any tariff rule with which to corroborate its rejection of the claim.

Thereafter, Complainant brought this complaint before the Commission alleging the facts as recited above. Respondent filed nothing in its behalf but a letter to the Settlement Officer stating:

> We would advise that the rate of $46.50 per 2000 lbs. we feel is the correct rate for Sodium Pyrophosphate which was the description shown on the shipper's Bill of Lading. Since there was no way for our New Orleans agent to know that the shipment was not as described on the Bill of Lading, it was impossible for him to apply a lower rate. If the shipper had classified his cargo as Sodium Acid Pyrophosphate, then the rate of $42.50 per 2000 lbs. would have been charged.
>
> We will of course abide by the ruling of your office regarding this matter.

In his decision in this proceeding, Settlement Officer Waldo R. Putnam found that the Complainant had sustained its burden of proof as to the actual character of the commodity which was moved. This conclusion, in conjunction with the finding that the tariff was ambiguous and should therefore be interpreted most favorably to the Complainant shipper, led Mr. Putnam to grant reparation.

DISCUSSION AND CONCLUSION

We have reviewed this proceeding and conclude that reparation should be granted as sought. We concur with the findings of the Settlement Officer insofar as he concludes that Complainant has met its burden of proof. We think it abundantly clear that the shipper shipped and the carrier's agent understood to have been shipped "Sodium

Acid Pyrophosphate." As such the commodity should have been rated, as it was, as "Sodium; viz: Acid Pyrophosphate."

However, we disagree that there is an ambiguity in the tariff which requires interpretation by us. There is nothing uncommon in having a reduced rate for a commodity temporarily existing side-by-side with the standard rate for a commodity. Here the precise commodity simultaneously showed a normal rate of $46.50 per 2000 lbs. and a temporary reduced rate of $42.50 per 2000 lbs. There is nothing ambiguous here. The carrier was able to classify the shipment with sufficient precision to apply the $46.50 rate and should have had no difficulty in applying the temporary reduced rate on that commodity. In light of our conclusion that the tariff is not ambiguous, we need not and do not adopt the reasoning of the Settlement Officer in this regard. We decide here only that Complainant has met its burden of proof and we therefore adopt the ultimate conclusion of the Settlement Officer that Complainant:

> . . . has successfully sustained the heavy burden of proof imposed upon it as to the proper identity of the commodity which actually moved.

Reparation granted.

Commissioners Ashton C. Barrett and Clarence Morse, concurring.

The decision of the Settlement Officer awarding reparations should be adopted but with changes.

This case does not involve the principles of *Kraft Foods v. Moore McCormack Lines, Inc.*, 14 SRR 603 (Docket No. 73–44, report served March 26, 1974; reconsideration denied, December 13, 1974). Rather, the principles enunciated in our opinion in *Abbott Laboratories v. United States Lines, Inc.*, Docket No. 73–36, report served March 20, 1975, are controlling.

We conclude the bill-of-lading description—sodium pyrophosphate—was sufficiently precise and synonymous with the tariff commodity description—sodium acid pyrophosphate—to justify the assessment of the appropriate commodity rate. Our views are fortified by the fact that the incomplete description of the goods stated on the bill of lading offered no obstacle to the rating clerk. Hence, the issue of burden of proof does not arise in this case. The Settlement Officer erred simply in failing to charge the Class 6W rate—the only applicable rate then in effect.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 305 (I)

P.P.G. INDUSTRIES, INC.

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY

ADOPTION OF DECISION

Apr 4 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* George H. Hearn, *Commissioner. Commissioners* Ashton C. Barrett and Clarence Morse, dissenting.)

This reparation claim is based upon an alleged overcharge by the carrier for transportation of cargo inaccurately described by shipper and his agent on both the bill of lading and the export declarations. This proceeding was conducted pursuant to 46 CFR 502.301 (informal procedure). Settlement Officer Genovese issued her decision awarding reparation. Because the Commission is currently reevaluating its policy in reparations claims, it was determined that the Initial Decision should be reviewed to ensure consistency of policy.

FACTS

Under bill of lading dated July 27, 1972, P.P.G. Industries, Inc. (P.P.G.) shipped certain cargo described by the shipper on the bill of lading and on the export declaration as 200 pails and one carton "polishes" aboard Royal Netherlands Steamship Company's (RNS) vessel from New York to Puerto Limon, Costa Rica. On the basis of this description, RNS assessed on the cargo its class 1 tariff rate applicable to "polishes, NOS." [1] Fourteen months thereafter, P.P.G. sought reparation relying on its description of the goods on its commercial invoice as DRX-45 Red Rubbing Compound (100 pails); DRX-55 White Rub-

[1] U.S. Atlantic & Gulf/East Coast of Costa Rica FMC Tariff No. 24, revised pages 35-a and 61.

bing Compound (100 pails); and 12 quarts DZL-3200 Light Gray Primer Surfacer shipped as samples without value.

RNS has a commodity rate in its tariff applicable to rubbing compounds [2] and a rule which applies to samples without value [3] which directs that such samples be assessed the rate applicable to the product with which the samples are shipped. Had RNS assessed the rate applicable to rubbing compounds and had it applied Rule 2(h), the cargo would have been transported at a cost of $336.52 rather than the amount assessed of $630.21 based on the polishes, NOS rate. The difference, $293.69, is the amount sought by P.P.G. as reparation.

P.P.G.'s claim was denied by RNS on the ground that the claim had not been filed within six months of the time of shipment as required by Rule 7(c) of the tariff.[4] RNS also contends that it was perfectly justified in relying upon the consistent description of the commodity as "polishes" found on both the bill of lading and the export declaration.

The Settlement Officer found that Complainant had sustained its burden of proof and permitted reparation as sought citing the Commission's decision in *Western Publishing Company, Inc. v. Hapag-Lloyd A.G.* (Informal Docket No. 283(I), served May 4, 1972, 13 SRR 16). In that case, the Commission set forth the rule generally applicable to reparation claims based on misdescription of cargo and held that notwithstanding the description in the bill of lading, what actually is moved, as shown by all relevant evidence, determines the rate applicable.

DISCUSSION AND CONCLUSION

The evidence relied upon by Complainant P.P.G. to show that the cargo shipped was rubbing compound consists of the commercial invoice cited above. That invoice is dated July 10, 1972, and shows a consignment of Red Rubbing Compound, White Rubbing Compound, and Light Gray Primer Surfacer to be shipped via Puerto Limon to Repuestos Perez, Ltda. Respondent RNS does not challenge this evidence nor does it contest the accuracy of the claim by P.P.G. that the cargo was, in fact, rubbing compound. RNS relies in its defense solely on the six-month rule which this Commission has repeatedly held to be no valid defense.

As a result, the decision of the Settlement Officer that reparation be granted on the basis of Complainant's adequate proof of what actually

[2] *Id.*, revised pp. 14 and 61.

[3] *Id.*, Rule 2(h), revised p. 51.

[4] *Id.*, Rule 7(c) which provides: "Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment."

was moved is hereby adopted as the decision of the Commission and is attached hereto and made a part hereof.

Reparation awarded.

Commissioners Ashton C. Barrett and Clarence Morse, dissenting:

We must conclude that the disposition of this case should be in accordance with the principles enunciated in our recent opinion in *Kraft Foods*, 14 SRR 603 (Docket No. 73–44, report served March 26, 1974; reconsideration denied, December 13, 1974) and deny reparations.

The factual situation may be stated quite simply. The carrier has on file a tariff Rule 2(o) which reads: "Whenever this Tariff provides different rates on a commodity dependent upon type or kind and adequate description is not stated in the bill of lading, it will be assumed that it is of a type or kind subject to the highest of the rates provided for the commodity—and freight will be assessed accordingly." The shipper and his agent supplied the carrier with a bill of lading (as well as an export declaration) which read merely 200 pails and 1 carton "polishes". Relying on its tariff Rule 2(o), the carrier had but one choice—to assess the "polishes, NOS" rate, in accordance with the mandate of section 18(b)(3), 46 U.S.C. 817(b)(3). Such was the case and concludes the matter.

In our opinion the majority has clearly erred by blindly adhering to the burden-of-proof test adopted in *Western Publishing Company, Inc. v. Hapag-Lloyd A.G.*, rather than giving recognition to the repudiation of such application in cases where the factual framework falls within the principles established in the more recent *Kraft Foods* decision.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 305(I)

P.P.G. INDUSTRIES, INC.

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY

Reparation awarded

Decision of Vera K. Genovese, Settlement Officer.[1]

P.P.G. Industries, Inc. (PPG) claims a refund from Royal Netherlands Steamship Company (respondent) for an alleged freight overcharge on a shipment of "polishes" carried from New York to Puerto Limon, Costa Rica, aboard respondent's vessel "SINON," under bill of lading No. 26, dated July 27, 1972.

The shipment is described in the bill of lading and export declaration as 200 pails and one carton of "polishes." Respondent's U.S. Atlantic and Gulf/East Coast of Costa Rica FMC Tariff No. 24 (the tariff) [2] includes "polishes n.o.s." in class 1 for which the applicable rate at the time of the shipment was $103.00 per 2000 lbs.[3] Computed on that basis respondent collected $630.21 in freight charges.

Relying on its commercial invoice [4] PPG claims that the shipment consisted of 100 pails—500 gallons of DRX-45 Red Rubbing Compound; 100 pails—500 gallons of DRX-55 White Rubbing Compound; and 1 carton containing 12 quarts of DZL-3200 Light Gray Primer Surfacer shipped as samples without value, which should have been rated at $55.00 per 2000 lbs.,[5] for a total freight charge of $336.52 or $293.69 less than collected by the respondent.

Respondent contends that in classifying the cargo it relied on the

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission Rules of Practice and Procedure (46 CFR 502.301), this decision shall be final unless the Commission elects to review it within 15 days from the date of the service thereof.

[2] Tariff rates and rules are quoted as in effect on the date of the shipment, July 27, 1972.

[3] Revised pages 35-a and 61 of the tariff.

[4] Invoice No. P-4395, dated July 10, 1972, from PPG to Repuestos Perez Ltda.

[5] Revised pages 14 and 61 of the tariff. Samples without value, if sent as advertising matter and subject to certain limitations as to weight and measurements are charged the rate applicable to the cargo with which they are shipped. Rule 2(h), revised page 51.

description on the bill of lading and the export declaration furnished by PPG.[6] Both these documents were prepared by the Gaynor Shipping Corp., an independent ocean freight forwarder following instructions received from PPG [7] and both described the shipment in identical terms, *i.e.* as "polishes." The Schedule B commodity number [8] on the export declaration specified by PPG also refers to "polishes n.e.c." (not elsewhere classified).

We are presented here again with a situation in which the shipper ships his goods under a certain description and then comes in claiming injury and reparation on the ground that the carrier violated the statute by charging the rate applicable to that description rather than a lower rate applicable to a description brought for the first time to the carrier's attention long after the process of transportation has ended.

Section 18(b)(3), 46 U.S.C. 817(b)(3), prohibits a carrier from collecting more or less or a different compensation than provided in its tariff in effect at the time of the shipment.

In construing the statute, the Commission has adopted the rule that notwithstanding the description in the bill of lading, what actually moves, as shown by all the evidence determines the applicable rate. *Western Publishing Company, Inc. v. Hapag—Lloyd A.G.*[9]

"Respondent is not contesting PPG's statement that the products described in the shipping documents as 'polishes' were 'rubbing compounds' as shown in PPG's commercial invoice."

That both descriptions may well cover the product [10] is immaterial here where the tariff contains a specific rate for rubbing compounds [11] which is the only rate applicable to that description.[12]

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[6]Respondent also denied the claim for PPG's failure to submit it within 6 months from the date of the shipment as required by Rule 7(c) of the tariff. The Commission has ruled, however, that a claim filed within two years from the date the cause of action arose must be considered on its merits. *Colgate Palmolive Company v. United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970. The bill of lading here is dated July 27, 1972 —the complaint was filed on September 3, 1973.

[7]By letter dated July 10, 1972, PPG directed the freight forwarder to prepare the shipping documents for "200 pails of polishes and 1 carton of lacquers spls." Fifteen copies of the invoice were attached to that letter so that both the sender of the letter and the Gaynor Shipping Corp. had at the time sufficient information to more accurately describe the cargo in the shipping documents.

[8]United States Bureau of the Census Schedule B Statistical Classification of Domestic and Foreign Commodities Exported from the United States. In preparing the Shipper's Export Declaration for merchandise exported from the United States, it is the exporter's responsibility to insert the Schedule B commodity number for the item exported.

[9]Informal Docket No. 283(I), served May 4, 1972, 13 SRR 16 (1972).

[10]Webster's New International Dictionary of the English Language Unabridged defines "compound" as: ". . . a chemically distinct substance formed by a union of two or more ingredients (as elements) to definite proportion by weight and with definite structural arrangement . . . ," (at p. 466); and "rubbing" as: "the motion or process of chafing, polishing, or otherwise treating or affecting a surface or body by the motion of applied pressure upon it." (at p. 1983).

[11]Revised pages 14 and 61 of the tariff.

[12]Cf. *United States v. Gulf Refining Company*, 268 U.S. 542,546 (1925) which held: "When a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable. And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate."

Rule 2(o), revised page 52 of the tariff, which requires descriptions in the bill of lading to be specific reads:

Consequently, under the rule of the *Western Publishing Company* case, *supra,* respondent's failure to charge the rate applicable to "rubbing compounds" rather than that applicable to "polishes", albeit induced by PPG's misdescription of the cargo in the shipping documents, constitutes a violation of section 18(b)(3) of the Act.

PPG is therefore awarded reparation in the amount of $293.69 with interest at the rate of 6 percent per annum if not paid within 30 days of the date hereof.

(S) VERA K. GENOVESE,
Settlement Officer.

"Wherever this Tariff provides different rates on a commodity dependent upon type or kind and adequate description is not stated in the bill of lading, it will be assumed that it is of a type or kind subject to the highest of the rates provided for the commodity—and freight will be assessed accordingly." The rule however is not applicable here as "compounds, rubbing" and "polishes" are listed as separate commodities so that neither is a "type or kind" of the other.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 306(I)

BRODHEAD GARRETT CO.

v.

UNITED STATES LINES, INC.

ADOPTION OF DECISION

Apr 4 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn and Clarence Morse, *Commissioners*)

This claim for reparation was instituted by complaint filed alleging improper imposition of charges by Respondent United States Lines, Inc. (USL) on two shipments of Complainant's cargo—one from New York to Pusan, Korea, and one from New York to Manila. The parties consenting, this claim was disposed of under the informal procedure provided in Rule 19 of this Commission's Rules of Practice and Procedure (46 CFR 502.301–304). Settlement Officer Royal W. Skiles issued his decision denying reparation on both claims. This Commission served notice of its determination to review that decision.

FACTS

Involved here are two shipments of Brodhead Garrett Co. (BG) cargo on USL vessels in August and November, 1972.

The first shipment was transported aboard USL vessel AMERICAN APOLLO on bill of lading dated August 26, 1972, from New York to Pusan, Korea, and was described on the bill of lading as "6 Boxes Refrigeration Demo. Training Units & Parts." This cargo was rated by the carrier per tariff item 2455 "Refrigerating Equipment with Refrigerating Machinery Installed" at the noncontract rate of $101.45 per ton applicable to Nagoya, Yokohama, Kobe, Osaka, Manila and

Hong Kong. Additionally, there was assessed a $2.00 per ton outport charge for the transportation to Pusan, Korea.*

BG alleges that the error involving charges on this shipment revolves around the carrier's failure to assess "a special rate" (non-contract) applicable to cargoes shipped to Nagoya, Yokohama, Kobe, and Osaka—that rate being $78.75 per ton. Tariff rule 1(e) mandates that special rates shall apply "only on the commodity and to the port for which the special rate is named." On this basis the Settlement Officer found BG's claim to the "special rate" not supported by the record.

The second shipment was transported from New York to Manila on USL's AMERICAN AQUARIUS on bill of lading dated November 4, 1972. This cargo was described (allegedly since the bill of lading is not found in the record) as "one box Electronic (or Electric) Demo., Training Parts Unit, Laboratory Apparatus and Equipment." Respondent USL applied its Cargo, N.O.S. rate of $115.85 per ton to this cargo since the tariff contains no such commodity description under any of the words used in this description. BG asserts that the "Machinery and Parts, NOS" rate should have been applied. As to this claim, the Settlement Officer found merely that USL's assessment of the Cargo, N.O.S. rate was "proper". He thereupon denied reparation on both claims.

DISCUSSION AND CONCLUSION

The claim here involved does not in terms allege an overcharge based on violation by the carrier of the mandate of section 18 of the Shipping Act, 1916. Rather, although seeking reparation for incorrect assessment of rates, the complaint alleges that the rates assessed were:

(1) unduly disadvantageous in violation of section 15;
(2) unjustly prejudicial in violation of section 16;
(3) unjust and unreasonable in violation of section 17.

We concur in the finding of the Settlement Officer with respect to denial of reparation. The Complainant here has failed to show, on the record, any misapplication of rates by the carrier in violation of section 18(b)(3) of the Shipping Act, 1916. Neither has there been shown any treatment either of cargoes or shippers which differs from that received by him. As a result, Complainant has failed to meet the burden of proof which he is bound to sustain in order to recover damages for the unduly disadvantageous, unjustly prejudicial and unjust or unreasonable treatment by the carrier that he alleges.

*The applicable tariff is Far East Conference Tariff 25, FMC No. 5.

The decision of the Settlement Officer is, therefore, adopted as the decision of the Commission and is attached hereto and made a part hereof.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 306 (I)

BRODHEAD GARRETT CO.

v.

UNITED STATES LINES, INC.

Reparation denied

Decision of Royal W. Skiles, Settlement Officer *

Brodhead Garrett Co. (BGC) claims $362.39 as reparation from United States Lines, Inc. (USL) for alleged overcharges on two shipments which moved on USL's vessels during August and November 1972, respectively. The first shipment moved on USL's bill of lading NY/PUSAN #10, dated August 26, 1972, from New York to Pusan, Korea, aboard the AMERICAN APOLLO. The second shipment moved on USL's bill of lading NY/MANILA #5, dated November 4, 1972, from New York to Manila aboard the AMERICAN AQUARIUS.

With respect to the first movement, the shipper described his cargo on the bill of lading (USL B/L#10) as "6 Boxes Refrigeration Demo. Training Units & Parts", which was rated by the carrier per Item 2455 "Refrigerating Equipment with Refrigerating Machinery Installed. . . . ," at Page 328 of Far East Conference Tariff 25, FMC No. 5.

As developed from the information on the bill of lading, the shipment measuring 609 cubic feet, rated on a measurement basis of 15.22 measurement tons @ $103.45 per ton, plus a bunker surcharge of $34.26, resulted in freight charges totaling $1,609.29. The rate applied to this shipment to Pusan, Korea, under tariff Item 2455 was the non-contract rate of $101.45 per ton of 2,000 pounds or 40 cubic feet, whichever produces the greater revenue, applicable to Group 1 port of Nagoya, Yokohama, Kobe, Osaka, Manila and Hong Kong, plus a $2.00 per ton differential over the rate to Group 1 ports constituting

*Both parties having consented to the informal procedure of Rule 19(a), 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

the $103.45 rate to Pusan, per the Outport Section, Page 16 of the tariff.

The second shipment from New York to Manila on the AMERICAN AQUARIUS was described on the Invoice and Shipping Advice furnished by BGC as "One Box Electronic Demo., Training Parts Unit, Laboratory Apparatus and Equipment,". In the absence of any tariff listing under" "electronic" "demo" "units" "training" "laboratory" "apparatus" or "equipment", the carrier rated the shipment under Item 535, "Cargo, Not Otherwise Specified" at Page 172 of Far East Conference Tariff 25, F.M.C. No. 5. Accordingly, the shipment measuring 75 cubic feet, rated on a measurement basis of 1.88 measurement tons @ $115.85 per ton, plus a currency surcharge of $7.60 resulted in freight charges of $224.82.

BGC's claim for an adjustment of rates was not based upon an "alleged error in weight, measurement or description." There is no dispute as to the bill of lading weight, measurement or description of the commodity involved. The issue here is one concerning the correct application of the tariff rates for the commodities named in the bills of ladings. BGC and USL agree that the shipper was not a contract signatory and was only entitled to the conference non-contract rate which was applied on both shipments.

The first shipment described on the bill of lading as "Refrigeration Demo. Training Units & Parts" was rated under Item 2455 of the applicable tariff under the category of "Refrigerating Equipment with Refrigerating Machinery Installed, viz. . . .", at the corresponding rate of $103.45 per ton, weight or measurement. BGC does not object to the rating of the commodity under Item 2455 but claims that the "special rate" (non-contract) under the same item at $78.75 per ton should apply. The tariff clearly indicated that the "special rate" only applies to the ports of Nagoya, Yokohama, Kobe and Osaka. Tariff Rule 1(e) entitled "Special Rate Authorizations" provides that "special rates published herein apply only on the commodity and to the port for which the special rate is named." BGC's claim in the amount of $345.61 representing the difference between the freight charges on this shipment in the amount of $1,609.29 actually assessed at the rate of $103.45, and that alleged to be applicable to the shipment in the amount of $1,263.68, if the special rate of $78.75 per ton were applied, is not supported by the record.

As to the second shipment, the claim submitted by BGC described the commodity as shown on USL's bill of lading NY/MANILA #5 as "one Box Electric Demo. Training Unit". The shipper's invoice contains a description of the commodity as "One Box Electronic Demo. Training Parts Unit, Laboratory Apparatus and Equipment". USL

rated this shipment under Item 535, Page 172 of the Far East Conference Tariff 25, FMC No. 5 "Cargo, not otherwise specified." The shipment measuring 75 cubic feet, rated on a measurement basis of 1.88 measurement tons @ $115.85 per ton, plus a currency charge of $7.60 resulted in freight charges of $224.82.

The tariff specified that Item 535 "applies on commodities not covered by individual rate items." BGC alleges that the shipment should have been rated per Item 1650, Page 274 of the tariff which applies to "Machinery and Parts, N.O.S.". USL submits that there is no listing under the tariff that fits the description "electrical" "demo." "units" "training" "laboratory" "apparatus" or "equipment", as furnished by BGC, and that there was no alternative than to apply Item 535 "Cargo, not otherwise specified". A check of the tariff supports USL's position. On the other hand, there clearly is nothing to indicate that the commodity would fall within the description of those included under Item 1650 "Machinery and Parts, N.O.S."

Based on the evidence of record, USL's rating of this commodity under Item 535 of the tariff in effect at the time of shipment, rather than under Item 1650, as urged by BGC was proper. Accordingly BGC's claim in the amount of $16.78 representing the difference between the freight charges in the amount of $224.82 as actually rated under Item 535 and that alleged to be applicable to the shipment in the amount of $208.04, had the rate under Item 1650 been applied, is not supported by the record.

A proper case for the recovery of reparation in the amount of $362.39 claimed by BGC for overcharges on the two shipments involved in this proceeding not having been made, BGC's claim for reparation in the amount stated is denied.

(S) ROYAL W. SKILES,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 315(I)

KRAFT FOODS

v.

ATLANTIC CONTAINER LINE, INC.

PARTIAL ADOPTION OF DECISION

Apr 4 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman. Commissioner* George H. Hearn, concurring. *Commissioners* Ashton C. Barrett and Clarence Morse, concurring and dissenting.)

This complaint filed by Kraft Foods (Kraft) seeks reparation in an aggregate sum of $391.52 from Atlantic Container Lines, Inc. (ACL). The claims are premised on alleged overcharges assessed by ACL upon four shipments of Kraft cargo transported by ACL from New York to Liverpool.[1] The parties agreeing, this case was conducted as an informal proceeding pursuant to Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR §502.301 through 502.304). Settlement Officer Cary R. Brady served his decision in this matter and the Commission thereafter determined to review the proceeding.

FACTS

The first shipment in question consisted of four pallets of "Mayonnaise" [2] moving on bill of lading dated July 13, 1972. The bill of lading showed this shipment to weigh 7,678 pounds and to measure 193 cubic feet. To this shipment ACL applied a tariff rate of $58.75 per 40 cubic feet resulting in a charge of $283.47. Kraft alleges that this application was in error; that the appropriate rate is $58.75 rated on

[1]Each shipment will be discussed separately for the sake of clarity.
[2]Descriptions conform to those on the respective bills of lading.

the basis of cargo "measuring not over 60 cu. ft. per 2240 lbs." [3]; and that the overcharge resulting from this misapplication is $82.09. Kraft notified ACL of its claim on November 9, 1973, and was advised on the basis of ACL's tariff Rule 22 that the claim was denied. Rule 22 provides in pertinent part:

> Claims for adjustment of freight charges, if based on alleged errors in weight or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier.

On the basis of this Commission's decision in *Kraft Foods v. Moore McCormack Lines, Inc.*, Settlement Officer Brady upheld ACL's refusal to afford reparation to Kraft Foods and denied Kraft's claim. Mr. Brady's reasoning was that:

> The issue in dispute involves the question of the appropriate stowage factor for the shipment which is a weight and measurement problem. Both elements of the carrier's weight/measurement claim rule being present the respondent [ACL] had no alternative but to comply with the rules of the conference tariff and deny the claim.

The second and third shipments disputed here were composed of four pallets of "Preserves" each. Each of these shipments was assessed a rate of $58.75 per 40 cubic feet, the rate applicable to "foodstuffs, N.O.S. packed, measuring over 60 cu. ft. per 2240 lbs." (Tariff item No. 3567). Kraft alleged that the proper rate to have been applied was that applicable to "Preserves, Fruit, Packed: Jams, Jellies, Marmalade" (Tariff item No. 6905) at $67.75 per 2240 pounds. The claims as to these shipments were timely filed within the two-year statutory time frame of the Act, but were rejected by ACL on the basis of its tariff Rule 22 precluding consideration of claims not filed within six months of the date of shipment.

Nothing that in misdescription cases, the Commission will not accept such a foreshortened limitation and will allow consideration of claims timely filed under the Act on their merits, Settlement Officer Brady denied these two claims on their merits. Mr. Brady concluded that a simple description "Preserves" did not meet the requisite "heavy burden of proof" as to the contents of these shipments to permit the claimant to prevail. In short, he concluded that the bill of lading description of "Preserves" was not sufficiently precise to meet the tariff description of "Preserves, Fruit, Jellies, Jams, Marmalades."

The fourth and final claim relates to a shipment of two pallets of "mustard" weighing 3000 pounds and measuring 132 cubic feet. ACL

[3] The rate($58.75) is the same for Foodstuffs, N.O.S. packed but differs in its application. Tariff item No. 3566 applies to foodstuffs "measuring not over 60 cu. ft. per 2240 lbs." on a weight basis, while item No. 3567 applies to foodstuff "measuring over 60 cu. ft. per 2240 lbs." on a W/M basis.

assessed a tariff rate of $76.75 per 40 cubic feet to this shipment, the rate applicable to "Spices, N.O.S., including flavoring salts, powders and pastes, packed" (Item No. 8232). Kraft alleged that the proper rate to be applied was $58.75, applicable to "Foodstuffs, packed N.O.S. measuring over 60 cu. ft. per 2240 lbs. W/M." Kraft supports its claim on the basis of the bill of lading description "mustard", and its assertion that the cargo was common table mustard. Respondent ACL has denied the claim again on the basis of tariff Rule 22 and offered no rebuttal to Kraft's assertions.

After some discussion of Webster's Dictionary definitions, Mr. Brady concluded that mustard could be a spice or it might not be. As a result, Mr. Brady determined that as the N.O.S. rate could be applicable and that under general principles "where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate." (citing *U.S. v. Gulf Refining Company*, 268 U.S. 542, 546 (1925)). He, therefore, allowed reparation on this claim.

DISCUSSION AND CONCLUSION

As noted in the Facts above, Settlement Officer Brady denied reparation on the first shipment (mayonnaise) on the basis of our previous decision in *Kraft Foods*. We are unable to agree with the conclusion of Mr. Brady that *Kraft Foods* provides the applicable precedent. ACL's bill of lading shows that the four pallets of mayonnaise measured 193 cubic feet and weighed 7678 pounds. There is no dispute as to these figures. The disputed fact is simply whether that measure/weight combination equals "not over 60 cu. ft. per 2240 lbs." (item No. 3566) or "over 60 cu. ft. per 2240 lbs." (item No. 3567). A simple mathematical computation would seem to be all that is required to resolve this issue. There is, in essence, here no claim for adjustment of freight charges based on alleged errors in weight or measurement. What is involved here is a dispute concerning the mathematics. Resolution of this issue in no way places the carrier in an untenable defensive posture as was the case in *Kraft Foods*. We, therefore, award reparation as sought with regard to the claim based on the shipment of mayonnaise.

As to the second and third claims (preserves), Settlement Officer Brady denied reparation on the basis that Complainant had had not shouldered the heavy burden of proof required to warrant recovery. We have reviewed the facts of this particular shipment and conclude that Mr. Brady's determination of this issue is correct. There is no

evidence of record by which Complainant has attempted to corroborate its claim based on the bill of lading description "preserves". Without such corroboration we are unable to find that Complainant has done more than make a simple assertion of its position. This does not reach the standard required of complainants in such cases in order to have such a claim sustained.

The fourth claim (relating to "mustard") we find to have been correctly determined by Settlement Officer Brady. Under the facts, it seems apparent that there could have been applied to this shipment either of two possible tariff rates. This being so we concur with Mr. Brady that the shipper is entitled to have the lower rate applied to his cargo.

Commissioners Ashton C. Barrett and Clarence Morse, concurring and dissenting.

The case should be remanded.

Claim No. 1 was denied by the Settlement Officer on the basis of *Kraft Foods,* 14 SRR 603 (Docket No. 73–44, report served March 26, 1974; reconsideration denied, December 13, 1974), and Rule 22 of the tariff. However, there is no dispute as to the weight and measurements of the shipment which appear on the bill of lading. The complaint alleges a mathematical error in the computation of the stowage factor, or disregard of that factor, in assessing the rate. *Kraft Foods,* therefore, does not apply. Reparation should be granted upon a proper computation of the stowage factor.

Claims Nos. 2, 3, and 4, alleging misclassification due to faulty description, were denied for lack of proof. Tariff Rule 3(f) provides that adjustments in the description in the bill of lading may be made only if in conformity with the export declaration. The proceeding should be remanded with instructions to take official notice of the tariff, obtain copies of export declarations, and decide the claims according to Rule 3(f). The *Kraft Foods, supra,* principle would apply to these claims.

An order to show cause should issue to require Atlantic Container Line, Inc., to show cause why it should not be held in violation of the Shipping Act, 1916, for its failure to adhere to the requirements of Tariff Rule 3(f) and, in particular, to verify the bill-of-lading description with the United States Export Declaration.

Commissioner George H. Hearn, concurring:

I concur in the resolution of all the claims herein. As to the first shipment, however, I find no basis for differentiating the matter from

the *Kraft* case. *Kraft Foods v. Moore McCormack Lines, Inc.*, 14 SRR 603, 606 (1974).

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

INFORMAL DOCKET NO. 315 (I)

KRAFT FOODS

v.

ATLANTIC CONTAINER LINE, INC.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER [1]

Reparation Awarded in Part

Kraft Foods seeks reparation in the amount of $391.52 from Atlantic Container Line, for alleged overcharges on four shipments which were carried on the respondent's vessels between June and October of 1972.

The first shipment consisted of 4 pallets of mayonnaise which moved from New York, New York to Liverpool, England, under respondent's bill of lading dated July 13, 1972. The bill of lading indicated the weight of the shipment to be 7678 pounds and measured 193 cubic feet. Respondent rated the shipment at $58.75 per 40 cubic feet, in accordance with item No. 3567, North Atlantic United Kingdom Freight Conference Tariff No. (47) FMC-2, 5th revised page 118. The $58.75 cubic rate applied to "Foodstuffs, N.O.S., Packed Measuring over 60 cubic feet per 2240 lbs. W/M."

Complainant contends that "when computing the stowage factor the measurement per 2240 lbs. for this shipment is 46 cft." and would come under tariff item 3566 which provides that "Foodstuffs, N.O.S. Packed, Measuring Not over 60 cu. ft. per 2240 lbs." would be rated on a weight basis. Under the $58.75 rate per 2240 lbs., the Complainant would save $82.09.

Respondent based its denial of the claim solely upon Rule 22 of the conference tariff which provides that:

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502, 301–304, this decision will be final unless the Commission elects to review it within 15 days from the date of service.

"Claims for adjustment of freight charges, if based on alleged errors in weight or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier. Any expenses incurred by the carrier in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found, by the claimant. All other claims for adjustment of freight charges must be presented to the carrier in writing within six (6) months after date of shipment." (Underscoring supplied).

The Commission, in *Kraft Foods v. Moore McCormack Lines, Inc.* Docket No. 73–44 (1974), affirmed the principle that "a carrier is strictly bound to adhere to the terms of the tariff as filed . . . unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916".

Rule 22 explicitly provides that claims based on alleged errors in weight or measurement have to be presented to the carrier prior to the time the shipment has left the custody of the carrier.

By letter dated November 9, 1974, the complainant filed its claim with the respondent approximately 15 months after the shipment had left the custody of the carrier. The issue in dispute involves the question of the appropriate stowage factor for the shipment which is a weight and measurement problem. Both elements of the carrier's weight/measurement claim rule being present the respondent had no alternative but to comply with the rules of the conference tariff and deny the claim.

Accordingly, in light of the strict tariff adherence mandate of Docket No. 73–44, and because of the complainant's failure to comply with the tariff rule, the instant claim for reparation is denied.

Respondent, in denying claims on the last three shipments, relied solely on the provisions of Rule 22 which require that claims be filed within six months after the date of shipment. However, the Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits. *Colgate Palmolive Company v. United Fruit Company,* Informal Docket No. 115 (I), served September 30, 1970. The claims have been filed within the statutory two year limit and thus will be treated on the merits.

The second shipment consisted of 4 pallets of preserves which moved from New York, New York to Liverpool, England under respondent's bill of lading dated June 28, 1972. The shipment weighed 8,000 pounds and measured 251 cubic feet. The third shipment consisted of 4 pallets of preserves which moved from New York, New York to Liverpool, England under respondent's bill of lading dated October 2, 1972. The shipment weighed 8160 pounds and measured 252 cubic feet. Respondent applied the rate of $58.75 per 40 cubic feet to both shipments, the applicable rate for "Foodstuffs, N.O.S. Measuring over

60 CFT. per 2240 lbs." in accordance with item 3567, North Atlantic United Kingdom Freight Conference Tariff No. (47) FMC-2, 5th revised page 118.

The claimant contends that the respondent misclassified both shipments and should have applied the rate of $67.75 per 2240 pounds, the rate for "Preserves, Fruit, Packed: Jams, Jellies, Marmalade" as per tariff item no. 6905, 4th revised page 156 of the conference tariff. Such a classification would have saved the claimant $250.03 in freight charges.

In support of its position claimant offers the bill of lading which describes the shipment as "Preserves" and nothing more.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the claimant can prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.[2] However, the claimant has a heavy burden of proof once the shipment has left the custody of the carrier.[3]

The tariff contains a specific commodity rate for "Preserves, Fruit" and in that classification identifies the specific type of preserves to which the rate is applicable, namely "Jams, Jellies or Marmalade". The bill of lading description of the shipments as "Preserves" standing alone does not meet the heavy burden of proof required when the commodity rate in issue is very clear as to what shipments are eligible under item no. 6905. Consequently, the shipment must take the Foodstuffs, N.O.S. rate. Claim denied.

The fourth shipment consisted of 2 pallets of "Mustard" which moved from New York, New York to Liverpool, England under respondent's bill of lading dated June 1, 1972. The shipment weighed 3,000 pounds and measured 132 cubic feet. Respondent rated the shipment at $76.75 per 40 cubic ft., the applicable rate for "Spices, N.O.S., including Flavoring Salts, Powders and Pastes, Packed" in accordance with item no. 8232, North Atlantic United Kingdom Freight Conference Tariff No. (47) FMC-2, 4th revised page 176.

The claimant alleges the shipment was misclassified and should have been rated under "Foodstuffs, N.O.S. Packed, Measuring not over 60 cu. ft. per 2240 lbs.", as per item no. 3567, 5th revised page 118 of the conference tariff. Such a classification would have saved the claimant $59.40 in freight charges.

The claimant in support of its contention offers the bill of lading

[2]Western Publishing Company, Incorporated v. Hapag-Lloyd A. G., informal docket No.283 (I) Commission Order served May 4, 1972.

[3]Colgate Palmolive Co. v. United Fruit Co., informal docket No. 115 (I) Commission Order served September 30, 1970.

description of the commodity as "Mustard" coupled with the statement the mustard is common table mustard and should be rated as Foodstuffs, N.O.S. The respondent has remained silent.

Webster's Third New International Dictionary of the English Language, Unabridged (1964) defines mustard as:

"1a: A pungent yellow *condiment* consisting of the pulverized seeds of the black mustard or sometimes the white mustard either dry or made into a paste (as with water or vinegar) and sometimes adulterated with other substances (as turmeric) *or mixed with spices* . . ." (Underlining Supplied).

It further defines spice as:

"1a: any of various aromatic vegetable products (as pepper, cinnamon, nutmeg, mace, all-spice, ginger, cloves) used in cookery *to season food* and to flavor foods (as sauces, pickles, cakes)". (Underlining Supplied).

and condiment as:

"a: an appetizing and usu. pungent substance of natural origin (as pepper, vinegar, *or mustard*". (Underlining Supplied).

Webster's New World Dictionary, College Edition (1968) defines these words as:

Mustard—"2. the ground or powdered seeds of this plant, often prepared as a paste, used as a *pungent seasoning for foods* . . ." (Underlining Supplied).

Spice—"1.a) any of several vegetable substances, as clove, cinnamon, nutmeg, pepper, etc., *used to season food*". (Underlining Supplied).

Condiment—"*A spice, seasoning, a seasoning* or relish for food, as pepper, *mustard*, sauces, etc.". (Underlining Supplied).

From the commonly accepted definitions of mustard and spice, coupled with that of condiment, it is reasonable to conclude that mustard, depending upon its final commercial form and use, could be a spice and then again it may not.

Based upon the paucity of evidence of record (the bill of lading) the commodity shipped could reasonably come under either general N.O.S. classification. *In United States v. Gulf Refining Company, 268 U. S. 542, 546 (1925),* it was held that "When a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable. And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate". In the instant case both classifications may well cover the commodity. Therefore, the shipper is entitled to the lower rate of item no. 3567. Reparation is granted in the amount of $59.40.

(S) CAREY R. BRADY,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 316(I)

P.P.G. INDUSTRIES, INC.

v.

UNITED STATES LINES, INC.

ADOPTION OF DECISION

Apr 4 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett and Clarence Morse, *Commissioners. Commissioner* George H. Hearn, dissenting.)

This case arose from a claim by P.P.G. Industries, Inc. (PPG) against United States Lines, Inc. (USL) for reparation of an alleged overcharge levied by USL on containerized cargo of PPG. The cargo in question was one 40-foot container, house-to-house movement, shipper's load and count said to contain 15 pallets of fibreglass yarn. The bill of lading described the cargo tendered to the carrier as: "(one) 40' container said to contain 15 pallets of Fiber Glass Yarn" with a gross weight of 38,999 pounds and measuring 1700 cubic feet "(Min.)."

To this cargo, USL applied the tariff rate applicable to "YARNS, VIZ: Fibreglass." The tariff (5th rev. page 218) provided as follows:

YARNS, VIZ:
Fibreglass

52381(I)—*Min. 1700 cuft. per container eff 10/30/72	W/M(R) $29.00
**Eff. Nov. 15, 1972 min. deleted	W/M(R) $29.00

The carrier assessed a total charge of $1232.50 on the basis of 1700 cu. ft. (Min.) at $29.00 per 40 cu. ft.

PPG alleged in its claim that the rate applied was erroneous because the minimum cubic foot requirement had been deleted from the tariff on November 15, 1972, while the shipment was made on December 1, 1972. PPG alleges that USL should have applied a rate of $29.00 to

a measurement of 914 cubic feet which represents the actual number of cubic feet of the cargo *inside* the container (15 pallets each measuring $34 \times 72 \times 43" = 914$ cu. ft.). So applied, the proper charge would be $662.65 which results in an alleged overcharge to PPG of $569.85.

This claim was denied by USL solely on the basis of its tariff Rule 16 which precludes consideration of any claim by a shipper based on errors in weight or measurement unless filed before the cargo leaves the custody of the carrier. The claim here was filed on April 19, 1973, regarding a shipment made on December 1, 1972. Therefore, maintains USL, the claim must be denied.

Settlement Officer Juan E. Pine upheld USL's position on the basis of *Kraft Foods v. Moore McCormack Lines, Inc.* Docket No. 73–44.

DISCUSSION AND CONCLUSION

We have reviewed this proceeding in light of the record and the *Kraft Food* precedent on which Settlement Officer Pine premised his decision. We concur in the finding of Mr. Pine that *Kraft Foods* provides the controlling principle and that reparation should be denied. The facts present a classic example of shipper allegation that the cargo had an inside measurement of 914 cubic feet while the shipping documents show only a 1700 cubic foot (minimum) description, thus leaving the carrier in a wholly defenseless position. There would seem to be no possible way for a carrier in such circumstances to rebut the allegations of a shipper. This is precisely the difficulty sought to be remedied in *Kraft Foods* which we find to be applicable here.

The decision of the Settlement Officer is, therefore, adopted as the decision of the Commission and is attached hereto and made a part hereof.

Commissioner George H. Hearn, dissenting:

Based upon my dissenting opinion in *Kraft Foods v. Moore McCormack Lines, Inc.*, 14 SRR 603, 606 (1974), I would grant reparation in this case.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 316(I)

P.P.G. INDUSTRIES, INC.

v.

UNITED STATES LINES, INC.

Reparation denied

Decision of Juan E. Pine, Settlement Officer.*

P.P.G. Industries, Inc. (PPG) claims $569.85 as reparation from United States Lines, Inc. (USL) for an alleged freight overcharge on a shipment of one 40-foot container loaded with 15 pallets of fiber glass yarn moving via the AMERICAN LEADER from Savannah, Georgia to London, England. The shipment moved on bill of lading No. 4006 dated December 1, 1972.

The description on the bill of lading covers one "40' container said to contain 15 pallets of fiber glass yarn" measuring 1700 cubic foot (minimum), weighing 38,999 pounds. USL applied the Fiberglass Yarns rate of $29.00 per ton of 2,240 pounds or 40 cubic feet as shown in Item 52381 on 5th Revised Page 218 of its Freight Tariff Number FMC-27. As the shipment weighed 17.4 tons and cubed 42.5 measurement tons, as developed from the above information on the bill of lading, USL assessed the rate on a measurement basis, i.e., 42.5 measurement tons @ $29.00 per ton, resulting in freight charges totaling $1,232.50.

USL rejected PPG's claim citing Rule 16 of Original Page 12 of the tariff which provides in part:

"Claims for adjustments of freight charges, if based on alleged errors in weight or measurement, will not be considered unless presented to the Carrier in writing before the shipment involved leaves the custody of the Carrier. . . ."

*Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

The bill of lading was dated December 1, 1972, and according to the record PPG's claim was filed against USL on April 19, 1973.

PPG claims that the shipment did not measure 1700 cubic feet and has submitted a packing slip which indicates the shipment consisted of 15 pallets, each measuring 34" × 72" × 43" for a total measurement of 914 cubic feet. In addition, PPG has submitted a copy of its invoice which covers 15 pallets of fiber glass yarn. It is alleged that based on the measurement of 914 cubic feet the above rate of $29.00 should have been assessed on 22.85 measurement tons, freight charges totaling $662.65.

PPG correctly points out that Item 52381 of the subject tariff showed two different rate applications for Fiberglass Yarns, i.e.:

"Min. 1700 cuft per container Eff. 10/30/72	WM$29.00
Eff. Nov. 15, 1972 min. deleted	WM$29.00"

Both rates cover "service one" and apply only when shipper loads and consignee unloads at their risk and expense off the premises of the ocean carrier. The bill of lading was stamped "HOUSE TO HOUSE MOVEMENT" and "SHIPPER'S LOAD, STOWAGE & COUNT." As the bill of lading was dated December 1, 1972 the tariff minimum of 1700 cubic feet per container was no longer in effect.

However, as USL was tendered the trailer already loaded the rate assessed was for 1700 cubic feet as was indicated on the bill of lading.

In *Kraft Foods* v. *Moore McCormack Lines, Inc.* Docket No. 73–44 (1974), the applicable tariff contained a rule which prohibited consideration of claims for overcharges based on alleged errors in weights or measurements unless the claim had been submitted to the carrier before the cargo had left his possession. The Commission upheld the carrier's denial of the shipper's claim on the basis of that rule.

Accordingly, in light of the strict tariff adherence mandate of Docket No. 73–44, and because of PPG's failure to comply with tariff Rule 16, this claim for reparation is denied.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 318(I)

KRAFT FOODS

v.

ATLANTIC CONTAINER LINE

ADOPTION OF DECISION

Apr 4 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* George H. Hearn, *Commissioner. Commissioners* Ashton C. Barrett and Clarence Morse, concurring.)

PROCEEDING

The claim in this docket results from transportation by Atlantic Container Line (ACL) of two Kraft Foods (Kraft) cargoes on June 1, 1972, and August 31, 1972. Each cargo consisted of four pallets of preserves.[1] The bill of lading for each shipment of preserves described the goods simply as "Preserves" and showed each to weigh 8,000 pounds and measure 251 cubic feet.

To these two identical shipments ACL applied its "Foodstuffs, NOS, packed, measuring over 60 cu. ft. per 2240 lbs" rate of $58.75 per 40 cu. ft. or 2240 pounds, whichever yields the greater revenue.[2] This resulted in a charge on each shipment of $368.65 or a total charge of $737.30. Kraft alleges that the appropriate charge was that applicable to "Preserves; Fruit, Packed: jams, jellies and marmalade." [3] That rate is $67.75 per ton of 2240 pounds, and its application would have resulted in a charge of $241.96 per shipment or $483.92 total charge. On this basis, Kraft alleges that it was overcharged by $253.38, the difference between $737.30 and $483.92.

In support of its claim, Kraft submitted copies of the bills of lading

[1]Each cargo also contained 3 pallets of honey but there is no dispute as to the charges assessed by ACL on these pallets in either shipment.

[2]North Atlantic/V.K. Freight Conference Tariff No. 47, FMC-2, Item 3567, 5th revised page 118.

[3]Id., Item 6905, 4th rev. page 156.

and export declarations. The bill of lading describes the goods as "Mixed Preserves PEC." The export declarations show the preserves to be described by Schedule B commodity number 053–3010. This number refers to jams, marmalades, and fruit jellies, apple butter, fruit butter, grapelade, guava jelly and preserves.

ACL denied Kraft's claim on the basis of its Tariff Rule 22, which precludes consideration of such claims unless filed within six months of the date of shipment. Since the Commission has repeatedly disallowed the defense, Settlement Officer Pine rejected this defense and proceeded to the merits of the claim. In so doing, and on the basis of Kraft's documentation and Schedule B commodity description, Settlement Officer Pine found Kraft to have sustained its burden of proving the actual character of the goods shipped. Reparation was therefore awarded in the sum of $253.38.

DISCUSSION AND CONCLUSION

We concur in the Settlement Officer's determination that complainant has sustained its burden of proof and should be awarded reparation as claimed. We note that the facts of this case are virtually identical to those in our recent Informal Docket 315(I), served April 8, 1975, with one notable exception. In 315(I) we disallowed the reparation claimed because of failure by complainant to corroborate its allegation. In the present proceeding complainant has provided the corroborating data which was missing in 315(I). Here Kraft has substantiated its bill of lading description by means of export declarations containing descriptive Schedule B commodity numbers. We find, as did the Settlement Officer, that this substantiation is sufficient to meet the heavy burden which must be borne by complainant to warrant the relief sought.

The decision of the Settlement Officer is, therefore, adopted as the decision of the Commission and is attached hereto and made a part hereof.

Commissioners Ashton C. Barrett and Clarence Morse, concurring.

Reparation should be awarded, but on grounds other than those relied on by the majority.

The Settlement Officer, without explicitly mentioning official notice, requested a copy of the export declaration and found that it supported the claim. He then awarded reparation on the ground that the shipper had proven his case,[4] citing *Western Publishing Co. v. Hapag-Lloyd*, Informal Docket No. 283(I), served May 4, 1972.[5]

[4]The shipper offered no other evidence than the bill of lading in both Informal Dockets Nos. 315(I) and 318(I).
[5]The burden-of-proof application was repudiated by the more recent *Kraft* decision, 14 SRR 603.

Tariff Rule 3(f) provides that adjustments in the description in the bill of lading will be accepted only if in conformity with the export declaration. This means that the export declaration and Schedule B commodity number determine the classification of the cargo for rating purposes.

Here the Schedule B commodity number supports the shipper's claim. Reparation should be awarded on this ground in conformity with Rule 3(f) of the tariff and in accordance with the principles of *Kraft Foods*, 14 SRR 603 (Docket No. 73–44, served March 26, 1974; reconsideration denied December 13, 1974).

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 318(I)

KRAFT FOODS

v.

ATLANTIC CONTAINER LINE

Reparation awarded

Decision of Juan E. Pine, Settlement Officer.[1]

Kraft Foods (Kraft) claims $253.38 as reparation from Atlantic Container Line, Ltd. (ACL) for alleged freight overcharges on two identical shipments.[2].

The first shipment consisted of four pallets of mixed preserves, and three pallets of honey, which moved from Elizabeth, New Jersey to Liverpool, England via the S/S ATLANTIC CONVEYOR on Bill of Lading No. A20047 dated June 1, 1972. The second shipment consisted of four pallets of preserves, and three pallets of honey, which moved from Elizabeth, New Jersey to Liverpool, England via the S/S ATLANTIC CAUSEWAY on Bill of Lading No. A20108 dated August 31, 1972.

As the shipments are identical and the applicable rate was not changed between the bills of lading dates of June 1, 1972 and August 31, 1972, this decision will be addressed to the shipment which moved via the S/S ATLANTIC CONVEYOR but will apply to both shipments. With respect to the three pallets of honey weighing 6,000 pounds, and measuring 188 cubic feet, there is no disagreement between Kraft and ACL over the assessment of the rate of $58.75 per ton of 40 cubic feet or 2,240 pounds, whichever yields the higher rate, under Item 3567

[1]Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2]ACL denied the claims for Kraft's failure to submit them within six months from the date of the shipment as required by Rule 22 of the tariff. The Comission has ruled, however, that a claim filed within two years from the date the cause of action arose must be considered on its merits. *Colgate Palmolive Company v. United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970. The bills of lading here are dated June 1 and August 31, 1972 - the complaints were filed on November 7, 1973.

on 5th Revised Page 118 of the North Atlantic United Kingdom Freight Conference Tariff No. (47) FMC-2 which covers Foodstuffs, N.O.S., Packed, Measuring over 60 cu. ft. per 2240 lbs. As these three pallets of honey measured 188 cubic feet, or 70.15 cubic feet per long ton of 2,240 pounds the rate was assessed on a measurement basis, i.e., 188 cubic feet @ $58.75 per 40 cubic feet, or $276.13.

However, the four pallets of preserves weighing 8,000 pounds, measuring 251 cubic feet, or 70.3 cubic feet per long ton of 2,240 pounds, were also assessed the same "Foodstuffs" rate, i.e., 251 cubic feet @ $58.75 per 40 cubic feet, or $368.65.

A review of the export declaration reveals that Kraft identified the Schedule B Commodity Number thereon for preserves as 053–3010. The *Statistical Classification of Domestic and Foreign Commodities Exported from the United States* indicates that this Commodity Number covers jams, marmalades and fruit jellies-apple butter, fruit butter, grapelode, guava jelly and preserves.

Item 6905 on 4th Revised Page No. 156 of the above tariff, which Kraft alleges should have been used, names a rate of $67.75 per ton of 2,240 pounds applying to Preserves; Fruit, Packed: Jams, Jellies and Marmalade. Under this tariff description, 3.5714 long tons (8,000 ÷ 2,240) of preserves at $67.75 per long ton would have been assessed transportation charges of $241.96.

Kraft may have anticipated that the "Preserves" description on the bill of lading was adequate. However, the description on the bill of lading should not be the single controlling factor, rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.[3] Here the Schedule B Commodity Number removes any doubt as to the commodities which moved. Therefore, the application of the lower rate covered by Item 6905 of the subject tariff as indicated by Kraft is proper.

The two identical shipments of preserves were assessed freight charges of ($368.65 × 2) $737.30. As indicated above, the freight charges that should have been assessed were (241.96 × 2) $483.92. Kraft was overcharged $253.38.

Kraft is therefore awarded reparation in the amount of $253.38 with interest at the rate of 6 percent per annum if not paid within 30 days of the date hereof.

(S) JUAN E. PINE,
Settlement Officer.

[3] *Western Publishing Company, Inc.* v. *Hapag-Lloyd A.G.*, Informal Docket No. 283(I), served May 4, 1972.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 320(I)

OCEAN FREIGHT CONSULTANTS, INC.

v.

ATLANTIC CONTAINER LINE, LTD.

ADOPTION OF DECISION

Apr 4 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* George H. Hearn, *Commissioner. Commissioners* Ashton C. Barrett and Clarence Morse, dissenting.)

PROCEEDING

The proceeding was instituted by complaint filed alleging overcharges by respondent Atlantic Container Line, Ltd. (ACL) on two shipments of diesel engines moving aboard respondent's vessels from New York to Liverpool. Both parties consenting, this proceeding was conducted under the informal procedure provided for in Rule 19 of our Rules of Practice and Procedure (46 CFR 502.301–304). Settlement Officer Lloyd H. Lipkey issued his decision in this case and the Commission thereafter determined to review the case.

FACTS

Ocean Freight Consultants, Inc. (OFC), as assignee of title to claims of the Caterpiller Tractor Company, claims $184.04 as reparation from Atlantic Container Line, Ltd. for alleged overcharges on two shipments of diesel engines. The first shipment was described on ACL Bill of Lading A 20062, dated September 6, 1972, as: "1 SKDBX D 343 ENGINE INTERNAL COMBUSTION-DIESEL TYPE ENGINE," and moved from New York to Liverpool aboard the ATLANTIC SAGA. The second shipment was described on ACL Bill of Lading A

20105, dated September 13, 1972, as: "1 BOX: D334 ELEC. SET-ENGINE ONLY INTERNAL COMBUSTION DIESEL TYPE ENGINE," and moved from New York to Liverpool aboard the ATLANTIC CONVEYOR.

The first shipment (ACL B/L A 20062), was rated by the carrier as Engines, viz: Internal Combustion, including gas or oil, and parts N.O.S. per Item 3097 North Atlantic UNITED KINGDOM Freight Conference Tariff No. (47) FMC-2 (NAUK FMC-2) at $70.25 per 40 cubic feet. On that basis charges of $247.63 were billed and collected on 141 cubic feet. The second shipment (ACL B/L A 20105), was rated by the carrier as Machinery, viz: N.O.S. per Item 5350 of the tariff $82.50 per 40 cubic feet, and charges of $323.81 were billed and collected on 157 cubic feet.

OFC claims that the rate applicable to both shipments under the tariff is Item 3062 which provides a $52.00 W/M charge applicable to "Engines, viz: Diesel and parts." Application of this rate rather than those assessed results in a saving to shipper/consignee of $184.04 sought to be recovered here. OFC supports its claim by submitting the pertinent tariff commodity rates and certain promotional pamphlets of the manufacturer showing the product to be diesel engines.

ACL denied the claim originally on the basis of its Tariff Rule 22 (1st rev. page 21 of the tariff) which prohibits adjustment of freight charges unless the claim is presented to the carrier within six months of the date of shipment. The carrier has presented no further support of its position during the proceeding.

Settlement Officer Lloyd H. Lipkey rejected the carrier's reliance of its rule 22 to defeat the claim. Citing *Colgate Palmolive Company v. United Fruit Company,** Mr. Lipkey noted that such a tariff rule could not be used by a carrier to defeat the claim of shippers filed within the two-year statutory period provided in section 22, Shipping Act, 1916. He thereupon awarded reparation as sought.

DISCUSSION AND CONCLUSION

We have reviewed this proceeding and concur in the decision of the Settlement Officer that reparation be awarded. However, we note that the Settlement Officer's decision rests solely on the ground that the rule relied upon by respondent may not be used to preclude relief in a case such as this. Implicit in this conclusion is the determination that complainant has also met its burden of proof. We agree, but are of the opinion that an affirmative finding that complainant has sustained its case should be made explicit. We are convinced that com-

*Informal Docket 115(I), Initial Decision served May 20, 1970, decision on remand issued October 6, 1970.

plainant has adequately met his burden of proof; that respondent's proferred defense is unsatisfactory; and that therefore reparation should be granted. With the minor modification, the decision of the Settlement Officer is adopted as the decision of the Commission and is attached hereto and made a part hereof.

Commissioners Ashton C. Barrett and Clarence Morse, dissenting:

On the basis of this record, we could not grant reparations. Rather, we would take official notice of Tariff Rule 3(f) and remand this proceeding to the Settlement Officer. Tariff Rule 3(f) requires the carrier to verify the Bill of Lading description with the United States Export Declaration and request amendment of the Bill of Lading if this requisite has not been carried out. Such verification has not been made. Under the circumstances, *Isbrandtsen Co., Inc. v. United States*, 96 F.Supp. 883 at 892 (1951), *aff'd. per curiam*, 342 U.S. 950, compels remand in order that a full record be established.

The burden-of-proof issue, therefore, is misplaced and need not be considered.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

INFORMAL DOCKET NO. 320(I)

OCEAN FREIGHT CONSULTANTS, INC.

v.

ATLANTIC CONTAINER LINE, LTD.

DECISION OF LLOYD H. LIPKEY, SETTLEMENT OFFICER [1]

Reparation Awarded

Ocean Freight Consultants, Inc. (O.F.C.), as assignee of title to claims of the Caterpiller Tractor Company, claims $184.04 as reparation from Atlantic Container Line, Ltd. (ACL) for alleged overcharges on two shipments of diesel engines. The first shipment was described on ACL Bill of Lading A 20062, dated September 6, 1972, as: "1 SKDBX D 343 ENGINE INTERNAL COMBUSTION-DIESEL TYPE ENGINE," and moved from New York to Liverpool aboard the ATLANTIC SAGA. The second shipment was described on ACL Bill of Lading A 20105, dated September 13, 1972, as: "1 BOX: D334 ELEC. SET-ENGINE ONLY INTERNAL COMBUSTION DIESEL TYPE ENGINE," and moved from New York to Liverpool aboard the ATLANTIC CONVEYOR.

The first shipment, (ACL B/L A 20062), was apparently rated by the carrier as Engines, viz: Internal Combustion, including gas or oil, and parts N.O.S. per Item 2097 North Atlantic UNITED KINGDOM Freight Conference Tariff No. (47) FMC-2 (NAUK FMC-2). Charges of $247.63 were billed and collected for 141 cubic feet, computed as 3.525 measurement tons (M/T) at $70.25 per M/T (40 cubic feet).

The second shipment, (ACL B/L A 20105), was apparently rated by the carrier as Machinery, viz: N.O.S. per Item 5350 of the above cited tariff. Charges of $323.81 were billed and collected for 157 cu. ft., computed as 3.925 M/T at $82.50 M/T.

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

The above cited applicable tariff provides in Item 3062, a specific contract rate for Engines, viz: Diesel and parts of $52.00 WM. The application of this rate in the above computations results in charges of $183.30 and $204.10 or overcharges of $64.33 and $119.71 totaling 184.04.

The carrier in response to the claim does not dispute the facts set forth above but merely states, ". . . our only reason for denying the claim from Messrs. Ocean Freight Consultants was North Atlantic United Kingdom Freight Conference Tariff Rule 22-A."

The above referenced tariff rule, cited in error as 22-A, is correctly identified as Rule 22 on 1st Revised Page 21, NAUK FMC-2, in effect and applicable for shipments on September 6 and 13, 1972, provides in pertinent part:

"*22. Overcharges: Claims for Adjustment in Freight Charges*
. . . All other claims for adjustment of freight charges must be presented to the Carrier in writing within six (6) months after date of shipment. . . ."

The Commission treated this argument in *Colgate Palmolive Company v. United Fruit Company,*[2] where it held that a tariff rule could not be used to defeat the two-year statute of limitation provided in Section 22 of the Shipping Act, 1916, (46 U.S.C. 821). The Commission in its Order to Remand in that case stated:

"Claims involving alleged errors of weight, measurement, or description . . . should not be disapproved *solely* on the procedural basis of a carrier imposed time limitation provision." (Emphasis in original.) Commission Order, served September 30, 1972, 11 SSR 971.

Since the claim was brought before the Commission within the two-year period provided by Section 22 of the Shipping Act, 1916,[3] the respondents denial of the claim is invalid.

On the basis of the foregoing, it is found that respondent collected a greater compensation for the service performed than specified in its duly filed tariff in violation of Section 18(b) of the Shipping Act, 1916.

Reparation in the amount of $184.04 is awarded.

(S) LLOYD H. LIPKEY,
Settlement Officer.

[2]Informal Docket 115(I), *Decision of the Examiner,* served May 20, 1970, 11 SSR 623, Decision on Remand, served October 6, 1970, 11 SSR 981; see *Proposed Rule-Time Limit on Filing Overcharge Claims,* 12 FMC 298, 308 (1969).

[3]The bills of lading are dated September 6 and 13, 1972, and the complaint was filed July 25, 1974.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 321(I)

ABBOTT LABORATORIES

v.

ALCOA STEAMSHIP COMPANY

ADOPTION OF DECISION

Apr 4 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* George H. Hearn, *Commissioner. Commissioners* Ashton C. Barrett and Clarence Morse, dissenting.)

Abbott Laboratories (Abbott) filed a claim alleging overcharge by Alcoa Steamship Company (Alcoa) on a shipment of Abbott's goods. The claim was handled as an informal proceeding and Settlement Officer Waldo R. Putnam issued his decision awarding reparation as sought. On its own motion, the Commission thereafter determined to review this proceeding.

FACTS

Under bill of lading dated January 12, 1973, Abbott shipped via Alcoa vessel cargo measuring 352 cubic feet and weighing 8,977 pounds from New Orleans to La Guaria, Venezuela. The shipment was described on the bill of lading as follows:

42 Fibre Drums	Raw Drugs
2 Stl. Drums	Raw Drugs
2 Cartons	Raw Drugs
2 Fibre Drums	Raw Drugs
48 Pkgs.	

To this shipment, Aloca applied the "Drugs, harmless" Class 1 tariff rate of $100.50 per 40 cubic feet,[1] which resulted in a freight charge of $884.40.

[1]U.S. Atlantic & Gulf/Venezuela and Netherlands Antilles Conference Tariff S.B. VEN-11 FMC No. 2.

By claim filed August 15, 1973, Abbott sought adjustment of these freight charges from Alcoa. In support of its claim, Abbott tendered its Export Declaration, Shipper's Invoice and Packing Slip. The Export Declaration shows what was described on the bill of lading as 48 packages of raw drugs to be actually the following:

Description	*Schedule B No.*	*Schedule B Description*
(a) 1-Fibre Drum. Betaine Hydrochloride	512.0380	Synthetic Organic Medicinal Chemicals, NEC, in bulk.
(b) 23-Fibre Drums. Cerelose Anhydrous	061.9010	Dextrose, including corn sugar, except pharmaceutical.
(c) 1-Carton. Span #80	554.2036	Surf. Actv. Agents, NEC, Except Detergents, Acid-Type Cleanrs & Text & Leath Finish Agents.
(d) 6-Fibre Drums. Vetrawet K	554.2022	Detergents, Anionic, Synthetic Organic, Bulk.
(e) 3-Fibre Drums, Calcium Phosphate	514.7099	Inorganic Chemicals, NEC Except Medicinals.
(f) 1-Fibre Drum INOSITOL	541.1040	Vitamin B, Except B_1 & B_{12}, Bulk, Except Pack for retail Sale or prep or 2 or more subst.
(g) 6-Fibre Drums. KAOLIN CLAY	276.2140	Kaolin Clay, including Calcined.
(h) 1-Carton. Magnesium Chloride	514.7099	(same as (e) above).
(i) 1-Fibre Drum. Mama Copolymer (emulsions)	581.2028	(no Schedule B No. 581.2027 is described as) Polyvinyl Polymer & Copolymer Resins NEC in unfinished forms.
(j) 1-Steel Drum. Corn Oil	422.9020	Corn Oil
(k) 1-Fibre Drum. Sodium Bicarbonate	514.8000	Inorganic medicinal chemicals NEC, in bulk.
(l) 2-Fibre Drums. Sodium Citrate	512.0380	Synthetic Organic Medicinal Chemicals, NEC.
(m) 1-Steel Drum. Sodium Lactate	512.0380	(same as (1) above).

On this basis, Abbott alleged that many of these items qualify for rates other than the rate applied. Abbott claims that: Items (a), (f), (l) and (m) were correctly assessed the Class 1 rate; Item (b) should have been assessed the Class 13 rate applicable to Dextrose (rated as Glucose); Items (c) and (d) should have been assessed the Class 11 rates applicable to Detergent, NOS; Item (e) should have been assessed the Class 16 rate applicable to Calcium Phosphate actual value not over $300 per freight ton; Item (g) should have been assessed the Class 22 rate applicable to Kaolin Clay, NOS; Item (h) should have been assessed the Class 6 rate applicable to Magnesium Chloride; Item (i) should have been assessed the item 495 rate applicable to Resins, synthetic; Item (j) should have been assessed Class 7 rate applicable to Corn Oil; and Item (k) should have been assessed the Class 7 rate applicable to Sodium Bicarbonate. On this basis, Abbott alleges that it would have been charged $478.04 less which it now seeks in reparation.

Alcoa rejected Abbott's original claim on the basis of its tariff Rule 11 which provides:

Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in description may be declined unless application is submitted in writing sufficiently in advance to permit verification of description, before the cargo leaves the carrier's possession.

In its defense before this Commission, Alcoa continues to rely on the above rule but also cites its tariff Item 2(m) which provides:

Wherever this tariff provides different rates on a commodity dependent upon type or kind and adequate description is not stated in the Bill of Lading, it will be assumed that it is of a type or kind subject to the highest rates provided on the commodity, and freight will be assessed accordingly.

DISCUSSION AND CONCLUSION

Having dismissed these defenses of Aloca, the Settlement Officer concluded that Abbott had met its burden of proving the character of the goods actually transported. As a result, he awarded reparation as sought. We concur in that conclusion, but we are constrained to note and discuss further certain points of this case.

The Settlement Officer also found Alcoa's reliance upon its tariff Rule 11 is misplaced and we agree. In cases involving a misdescription of goods, such a rule may not be used to shelter a carrier from its obligation to pay a legitimate overcharge claim which is timely filed with this Commission.[2] Moreover, we believe that the discretionary nature of the tariff provision renders it unenforceable. In *P.P.G. Industries, Inc. v. Royal Netherlands Steamship Co.*,[3] we discussed at length the use of the word "may" in a rule similar to that relied upon by Alcoa and stated that such a discretionary rule was in effect ". . . no rule at all." The Commission further stated that it would not, in the future, permit carrier reliance upon rules which allow for discretion in a carrier's consideration or denial of claims; that such rules will not in and of themselves be permitted to defeat a claim for overcharges.

This Commission also has previously considered the argument that one's tariff requires that inadequate cargo description on the bill of lading be assessed the highest tariff rates. In *Western Publishing Company, Inc. v. Hapag-Lloyd A.G.*[4] we determined that, notwithstanding the description in the bill of lading, what actually moves as shown by all the evidence determines the applicable rate and has since upheld that rationale.[5]

[2]See Informal Docket No. 292(I) served February 14, 1973-*P.P.G. Industries v. Flota Mercante Grancolombiana S.A.*

[3]Informal Docket No. 290(I) served May 16, 1974.

[4]Informal Docket No. 283(I) served May 4, 1972.

[5]See Docket No. 73-36, *Abbott Laboratories v. United States Lines, Inc.* (served March 20, 1975).

Finally, this Commission cannot disagree with the showing of Abbott Laboratories that the products shipped were something other than "raw drugs". Nor can we dispute the showing by Abbott that there are lesser rates more appropriately applicable to these various commodities. We are dismayed, however, by Abbott Laboratories' slipshod procedures. The willy-nilly description of such items as corn oil and detergents as "raw drugs" on a bill of lading is inexcusable. Consequently, we sympathize with a carrier who relies upon a drug-producing firm's own description of packaged goods as "raw drugs" and assesses a raw drugs tariff rate based thereon. While we are unable to gainsay the decision here and feel obliged reluctantly to approve it, we also feel that some expression of disfavor towards Abbott's practice is mandated here.

Were this Commission clearly possessed of equitable powers in cases such as this, we would be disposed to deny this claim. The actions of Complainant in its description of its own products should, under equity, preclude its recovery. Being unable so to judge this case, we hereby adopt the decision of the Settlement Officer which is attached hereto and made a part hereof.

Commissioners Ashton C. Barrett and Clarence Morse, dissenting:

We would deny the granting of reparation for the reasons stated in our concurring and dissenting opinion in *Economics Laboratory v. Prudential-Grace Lines* (Informal Docket No. 301(F), Adoption of Initial Decision served March 20, 1975), and in accordance with *Kraft Foods v. Moore McCormack Lines, Inc.*, 14 SRR 603 (Docket No. 73–44, report served March 26, 1974; reconsideration denied, December 13, 1974). Tariff rules should be applied unless found to be unlawful after a proceeding affording due notice to the carrier and an opportunity to be heard on that issue.

The majority erred by ruling out the possible application of the second sentence of Tariff Rule 11,[6] citing *P.P.G. Industries, Inc., supra.* In that case the Commission on May 16, 1974, found that, *prospectively,* a tariff rule is unlawful in those instances where the use of the word "may" is included, as it is in Tariff Rule 11. Here, claimant's cause of action originated *prior* to service of the Commission's Order of Remand in that case. Claimant's bill of lading is dated January 12, 1973. It is clear that the cargo had left the carrier's possession long

[6]Tariff Rule 11

Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in description may be declined unless application is submitted in writing sufficiently in advance to permit verification of description, before the cargo leaves the carrier's possession.

before May 16, 1974. The Commission's pronouncement in *P.P.G. Industries Inc., supra,* had not been served and therefore does not apply to a claim which was already barred under Tariff Rule 11, second sentence (having left the carrier's possession without submission of written claim for adjustment of freight charges for alleged error in description). Hence, we should accord the same treatment to the parties in this proceeding as that accorded in *P.P.G. Industries, Inc., supra.* Foreclosing the opportunity for a conference or carrier to apply perhaps a "discretionary rule" in the present proceeding would be a denial of due process.

The case should be remanded to the Settlement Officer with instructions to proceed as directed in the Order on Remand served May 16, 1974, in *P.P.G. Industries, Inc., supra,* i.e., "determine whether or not . . . (this respondent) has, in fact, consistently relied upon . . . (Tariff Rule 11) in past claims of the sort provided here." Only after this determination has been made should the merits of the case be decided.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 321(I)

ABBOTT LABORATORIES

vs.

ALCOA STEAMSHIP COMPANY

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER [1]

Reparation Awarded

Abbott Laboratories (Abbott) claims a refund in the amount of $478.04 from Alcoa Steamship Company, Inc. (Alcoa) for an alleged freight overcharge on a shipment of "raw drugs" carried from New Orleans, Louisiana to La Guaira, Venezuela aboard Alcoa's vessel "IRMGARD REIGH" under Bill of Lading No. 11N8611 dated January 12, 1973.

In support of its claim for refund Abbott submitted a copy of its Claim No. A2904; Bill of Lading; Export Declaration; Commercial invoice and packing list and a copy of Alcoa's denial of the claim based solely upon its tariff item [2] barring consideration of claims not filed within six months subsequent to the date of sailing.[3] Abbott alleges that the shipment consisted of various commodities as shown on the Commercial Invoice and the description of each item was shown on the Export Declaration duly identified by correct Schedule "B" number.[4] The bill of lading described all commodities as "Raw Drugs" applying Class 1 rate (352' at $100.50=$884.40) whereas the tariff provides specific rates for various commodities in question which results in lower freight charges amounting to $406.36. A claim for refund

[1]Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2]Item 11, U.S. Atlantic & Gulf-Venezuela and Netherland Antilles Conference Tariff S.B. VEN-11, FMC No. 2.

[3]The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits. *Colgate Palmolive Company* v. *United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970. The bill of lading here is dated January 12, 1973—the complaint was filed on August 14, 1974.

[4]United States Bureau of the Census Schedule B Statistical Classification of Domestic and Foreign Commodities Exported from the United States. In preparing the Shipper's Export Declaration for merchandise exported from the United States, it is the exporter's responsibility to insert the Schedule B commodity number for the item exported.

of $478.04 was submitted to Alcoa Steamship Company on August 15, 1973.

In reply to the complaint, Alcoa stated that the claim was denied in accordance with the following tariff provisions:

> 1. Claimant failed to file timely notice of its claim pursuant to Item 11 of United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference Tariff S.B. VEN-11, FMC No. 2. Item 11 reads in part "Claims by shippers for adjustment of freight charges will be considered only when submitted writing to the carrier within six months of date of shipment."
>
> 2. Item 11 of the aforementioned tariff further reads in part "Adjustment of freight based on alleged error in description may be declined unless application is submitted in writing sufficiently in advance to permit verification of description before the cargo leaves the carrier's possession.
>
> 3. Item 2 paragraph (m) of the tariff reads "Wherever this tariff provides different rates on a commodity dependent upon type or kind and adequate description is not stated in the Bill of Lading, it will be assumed that it is of a type or kind subject to the highest rates provided on the commodity, and freight will be assessed accordingly."

Further, Alcoa denies the allegations of the complaint with respect to collecting charges in excess of those lawfully applicable on a shipment described on the bill of lading as "Raw Drugs." Freight charges were properly assessed on the basis of the description set forth on the bill of lading.

Alcoa's reliance upon the so-called "six month" rule requires little comment. While strict adherence to the published tariff provision was required by the carrier, such rule has no force nor effect upon Alcoa's obligation to pay a legitimate overcharge claim which is timely filed with this Commission.[5]

Alcoa's defense based upon the tariff provision stating that ". . . Adjustment of freight based upon alleged error in description *may* be declined unless application is submitted in advance to permit verification of description before cargo leaves the carrier's possession" (underscoring supplied) is also rejected. In *P.P.G. Industries, Inc.* v. *Royal Netherlands Steamship Co.*[6] the Commission discussed at length the use of the word "may" in a rule similar to that relied upon by Alcoa and stated that such a discretionary rule was in effect ". . . no rule at all." The Commission further stated that it will not, in the future, permit carrier reliance upon rules which allow for discretion in a carrier's consideration or denial of claims; and that such rules will not in and of themselves be permitted to defeat a claim for overcharges.

The Commission also has previously considered the Alcoa defense that its tariff requires that inadequate cargo description on the bill of

[5]See Footnote 3 and Informal Docket No. 292(I) served February 14, 1973 - *P.P.G. Industries* v. *Flota Mercante Grancolombiana S.A.*

[6]See Informal Docket No. 290(I) served May 16, 1974.

lading dictates the assessment of the highest tariff rates. In *Western Publishing Company, Inc.* v. *Hapag—Lloyd A.G.*[7] the Commission determined that, notwithstanding the description in the bill of lading, what actually moves as shown by all the evidence determines the applicable rate. The evidence indicates that Alcoa had sufficient documentation before it to have properly rated each and every commodity involved on an individual basis.

Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)) prohibits a carrier from collecting more or less or a different compensation than provided in its tariff and in effect at the time of the shipment.

Abbott's claim, a copy of which was served upon Alcoa, included a rating of the individual commodities in accordance with the Schedule B commodity numbers shown on the shipper's Export Declaration with reference to the applicable tariff items. Alcoa, in its reply, did not take exception to the rates alleged to be correct by the complainant. Accordingly, in the absence of evidence to the contrary, the involved shipment was improperly rated by the carrier and the shipper is entitled to reparation in the amount of $478.04; *and it is so ordered.*

(S) WALDO R. PUTNAM,
Settlement Officer.

[7]See Informal Docket No. 283(I) served May 4, 1972.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–2

MERCK SHARP & DOHME (I.A.) CORP., A DIVISION OF MERCK & COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Action by carrier in charging transported goods, described as Lactalbumin Powder 100, the Cargo, N.O.S. rate, was proper and is not a violation of section 18(b)(3) of the Shipping Act, 1916.

Manuel Blasco for Complainants, Merck Sharp & Dohme (I.A.) Corp.

ADOPTION OF INITIAL DECISION

Apr 24 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman. Commissioners* Ashton C. Barrett and Clarence Morse, concurring. *Commissioner* George H. Hearn, concurring.)

By complaint filed with the Commission on January 14, 1974, Merck Sharp & Dohme (I.A.) Corp. (Merck) claimed that Flota Mercante Grancolombiana, S.A. (Flota), a common carrier by water between the United States Atlantic and Gulf ports to Baranquilla, Cartagena, and Santa Marta, Colombia, and a member of the East Colombia Conference, had, on three occasions, assessed freight rates higher than those properly applicable in accordance with the issued tariff. Administrative Law Judge John E. Cograve, in his Initial Decision served October 18, 1974, dismissed the complaint. The proceeding is before us on exceptions filed by Merck, to which no reply was received.

FACTS

The three shipments at issue moved from New York to Baranquilla, Colombia, and the specific commodity shipped was described on the bills of lading as "Lactalbumin Powder 100." Flota rated the shipments as cargo N.O.S. This resulted in a higher charge than would have been the case if the shipments had been classified Powdered Milk, N.O.S., which classification Merck suggested was proper. On the basis of the above, Merck alleged a violation of section 18(b)(3) of the Shipping Act, 1916,[1] and sought reparation in the amount of $1,678.01, which represented the alleged total overchange on the three shipments.

The three shipments in question covered a span of 20 months and involved bills of lading dated January 6, 1972, February 14, 1972, and September 7, 1973. The first two shipments were covered by the East Coast Colombia Conference Freight Tariff, FMC No. 1, 11th Rev. Page 46, effective January 2, 1972.[2] This tariff contained a rate for "Milk, Powdered, Plain or Skim, N.O.S. (not Milk Compounds)" of $60.80 per 2,000 lbs. (Item No. 595).

The applicable tariff at the time of the third shipment was the East Colombia Conference Freight Tariff, FMC No. 1, 14th Rev. Page 46, effective August 27, 1973,[3] which contained a rate for "Milk, Powdered or Skim, N.O.S. (not Milk Compounds)" of $71.00 per 2,000 lbs. (Item No. 595).

The applicable tariff of N.O.S. rates at the time of all three shipments was the East Coast Colombia Freight Tariff, FMC No. 1, 1st Rev. Page 73, effective September 29, 1969, which contains a rate for "Cargo, N.O.S., Not Dangerous," of $87.00 per 2,000 lbs. (Class or Item No. 1). All the aforementioned are contract rates.

INITIAL DECISION AND EXCEPTIONS

In the Initial Decision the Administrative Law Judge denied reparation and dismissed the claim.

In rejecting Complainants' argument, Judge Cograve drew the following distinctions:

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[1]Section 18(b)(3), Shipping Act, 1916:

No Common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. . . .

[2]Not the 10th Rev., effective January 5, 1970, as alleged (although both revisions carried the same commodity description and rate).

[3]Not the 13th Rev., effective January 1, 1973, as alleged (again, both revisions carried the same commodity description and rate).

"Powdered Milk is dried milk. *Webster's Third New International Dictionary of the English Language,* 1966 Edition. Casein is the chief protein in milk. *Encyclopedia Brittanica,* Volume I, Page 524 1973 Edition. Albumins are a class of proteins. Among the best known [is] lactalbumin (in milk) . . . Volume V, Page 10, Ibid."

Merck had argued that Lactalbumin is casein which is coagulated from milk by rennet or by dilute acids, filtered and dried. Having thus been dried, Merck argued, this product should be considered to be "powdered milk." The Administrative Law Judge did not so find. Rather, he found that:

. . . coagulation or precipitation of casein from liquid milk is certainly not dehydration as contended by complainant. Powdered milk is produced by dehydration which is the mechanical removal of water. *Brittanica,* Volume VII, Page 180. Coagulation or precipitation is the change from fluid to a thickened mass or the separation out in solid form from a solution by means of a reagent. Lactalbumin (casein) is produced by chemical separation or reaction.

Additionally, Merck had indicated the use for Lactalbumin is in the compounding of adhesives, varnishes, or ivory substitutes. Moreover, in Merck's own evidence (attachment G), Lactalbumin is listed as "Chemicals," rather than as foods. The Administrative Law Judge held that this characteristic of Lactalbumin simply reinforced his findings since the commonly recognized use for powdered milk is nourishment. Further, the Administrative Law Judge concluded that were Lactalbumin to be considered "powdered milk," the addition to it of water should reconstitute it liquid milk. In fact, he found, the addition of water to casein would result in neither a potable nor a comestible. He, therefore, concluded that Lactalbumin was not powdered milk as alleged by Merck.

Exceptions to the Administrative Law Judge's Initial Decision were filed by Merck. No replies to those exceptions were filed by Flota.

In general, Merck's exceptions challenge the Administrative Law Judge's ultimate conclusion that it had not met its burden of proof by showing that Lactalbumin is a form of powdered milk. Merck argued that the Administrative Law Judge had reached his conclusion by a "strained and unnatural interpretation and construction of the facts and the Tariff provision. . . ." Merck believes that it had met its burden, has fully proved that Lactalbumin is Powdered Milk, and that the proper rate for the transported Lactalbumin should have been the same as that for Powdered Milk.

Additionally, Merck contends that the Administrative Law Judge's discussion of the terms "coagulation or precipitation," "dehydration," and "mechanical removal" have "no bearing" on whether or not Lactalbumin is or is not a form of powdered milk.

In this connection, it is argued that: Lactalbumin is powdered milk

formed when milk is coagulated; that the curds formed by the use of dilute acid or rennet change into a thickened mass; and that the liquid is filtered off and the coagulated milk is dried and powderized.

In support of this position, Merck has raised numerous allegations of factual error on the part of the Administrative Law Judge. These alleged errors include the following propositions: That lactalbumin is Albumin Milk, which is the coagulated curds or casein in milk, or, curdled milk; that coagulation and curdling is achieved by use of rennet; that the curdled or coagulated Albumin Milk is dehydrated by filtering off—a mechanical operation - and removing from the milk the residual water by evaporation, leaving the curds or coagulated milk; that the curds or coagulated milk is further dehydrated by thoroughly evaporating the residual moisture; and that this dehydrated-evaporated Albumin Milk is then powdered, becoming, Merck alleges, Powdered Milk.

Merck further stresses that Milk itself, though a foodstuff, may and does have other important uses, and that it is classified and listed as a chemical. Thus, Merck urges, the fact that Albumin Milk, Powdered, has uses other than as food should have no bearing on the decision factors in this instance.

While the discussion above represents a synthesis of all the exceptions raised by Merck, we have reviewed every allegation of error whether set forth in the preceding paragraphs or not. Any exception not discussed below was found to raise issues not necessary to the ultimate disposition of this case, or to have been subsumed in the description of the exceptions above.

DISCUSSION AND CONCLUSION

The principle issue raised by Merck, simply stated, is whether the product which comprised the shipment in question consisted, in fact, of Powdered Milk so as to qualify for the commodity rate published in Respondent's tariff for that designation.

In cases of this kind we have established the rule that the determining factor is what the Complainant can prove based upon all the evidence as to what was actually shipped. Informal Docket No. 256(I), *Union Carbide Inter-America v. Venezuelan Line*, Order on Review of Initial Decision, November 12, 1973; *Western Publishing Co. v. Hapag Lloyd A.G.*, Docket No. 283(I). Where, as here, the shipment has left the custody of the carrier, and the carrier is thereby prevented from personally verifying the Complainant's contentions, we have held that the Complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definite-

ness the validity of the claim. *Western Publishing Co. v. Hapag Lloyd A.G., supra; Johnson & Johnson International v. Venezuelan Lines,* 16 F.M.C. 84 (1973); *United States v. Farrel Lines, Inc.,* 16 F.M.C. 41 (1973); *Colgate Palmolive Peet Co. v. United Fruit Co.,* Docket No. 115(I). Consideration of the evidence submitted by Merck demonstrates that Merck has not met the heavy burden and has failed to establish with reasonable certainty and definiteness the validity of its claim.

There is nothing in the record which persuades us that Lactalbumin and Powdered Milk are synonymous. Lactalbumin, a protein, is, by definition, a compound derived from milk. As such, it is neither milk nor Powdered Milk.[4] Since the tariffs in question, East Coast Colombia Conference Freight Tariff, FMC No. 1, 11th Rev. (for the first two shipments) and 14th Rev. (for the third shipment) only apply to "milk, powdered, plain or skim," which Lactalbumin is not, and specifically do not apply to milk compounds, which Lactalbumin is, we conclude that Merck's claim must be denied.

The evidence furnished by Merck clearly does not establish that a shipment described on Respondent's bill of lading as "Lactalbumin Powder 100" was in fact Powdered Milk which would have been entitled to a lower rate than what was actually assessed.

We note that Complainant's exceptions generally constitute nothing more than a reargument of contentions already advanced before the Administrative Law Judge and properly disposed of by him.

Accordingly, we adopt the Initial Decision, a copy of which is attached hereto and made a part hereof. *Commissioners Ashton C. Barrett and Clarence Morse, concurring.*

Because of the Administrative Law Judge's reliance on *Western Publishing Company, Incorporated v. Hapag-Lloyd, A.G.,* Informal Docket No. 283(I), 1972, despite the implications of *Kraft Foods v. Moore McCormack Lines, Inc.,* 14 SRR 603 (Docket No. 73–44, report served March 26, 1974; reconsideration denied, December 13, 1974), we would delete the concluding paragraph of the Initial Decision of the Administrative Law Judge and substitute the following:

As in *Kraft Foods, supra,* and our dissenting opinion in *Ocean Freight Consultants v. Royal Netherlands Steamship Company* (Docket No. 72–39, report served January 30, 1975), we approach these matters by first determining if there is a lawful tariff rule applica-

[4]See *Steadman's Twenty-Second Edition Medical Dictionary,* 1972, which contains the following definitions:
Albumin: "A type of simple protein widely distributed throughout the tissues and fluids of plants and animals. They are soluble in pure water, precipitable from a solution by mineral acids, and coagulable by heat in acid or neutral solution. Varieties are found in blood, milk, and muscle."
Lactalbumin: "The albumin fraction of milk. It alters an enzyme in milk so that it becomes capable of synthesizing lactose."

ble to reparation claims based on asserted errors in weight, measurement, or description. If there is such lawful rule in the tariff, we give effect to that rule. Absent such tariff rule, we then consider the matter on general principles of tariff classification interpretation. There is such a tariff rule here, but it is not applicable under the facts in this case.

Here, there is no claimed error in weight, measurement, or description. Rather, this is a simple factual question whether Lactalbumin is "a form of powdered milk". That the shipment is Lactalbumin is not challenged, and burden of proof as to the exact nature of the shipment is not an issue. Since the exact nature of the shipment is known and undisputed, the only issue here is the simple question whether that commodity fits within the tariff item "Milk, Powdered, Plain or Skim, N.O.S. (not Milk Compounds)". It does not. Therefore, the complaint is dismissed.

Commissioner George H. Hearn, concurring:

I agree with the denial of reparation; and although I generally concur in the reasoning of the Adoption of Initial Decision, I do not adopt the portion of the text accompanying footnote 5 of the Initial Decision.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74-2

MERCK SHARP & DOHME (I.A.) CORP.,
A DIVISION OF MERCK & COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Reparation denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE [1]

This complaint by Merck Sharp & Dohme (I.A.) Corp., (Merck) against Flota Mercante Grancolombiana, S. A. (Flota), involves three shipments evidenced by bills of lading dated January 6, 1972, February 14, 1972, and September 7, 1973. Flota has not filed a formal answer but rather relied upon a letter reply denying the claim. This along with the necessity for the submission of clearer copies of the bills of lading and a more complete documentation of payment delayed disposition of these claims. All the shipments were drums of a commodity described as Lactalbumin Powder 100, consigned to Roldan & Cia. Ltda., Barranquilla, Colombia. All the bills of lading are "Ocean freight collect" or "Freight collect". Flota rated the shipments as cargo N.O.S. This resulted in a higher charge than would have been the case if the shipments had been classified Powdered Milk, N.O.S., which classification Merck suggests was proper. Merck seeks reparation in the amount of $1,678.01, which represents the alleged total overcharge on the three shipments.

Merck seeks disposition of the complaint under Rule 11, *Shortened Procedure,* Rules of Practice and Procedure, 46 CFR 502.181. While normally specific consent to the shortened procedure is necessary, in view of the disposition of the claim, formal consent would only prolong justice.

The shipments span a period of twenty months. The applicable tariff

[1] This decision became the decision of the Commission 4/24/75

at the time of the first and second shipments was the East Coast Colombia Conference Freight Tariff, F.M.C. No. 1, 11th Rev., effective January 2, 1972, (not the 10th Rev., effective January 5, 1970, as alleged),[2] page No. 46, which contains the rate for Milk, Powdered, Plain or Skim, N.O.S. (not Milk compounds), $60.80 per 2000 lbs. as per Item No. 595.

The applicable tariff at the time of the third shipment was the East Coast Colombia Conference Freight Tariff, F.M.C. No. 1, 14th Rev., effective August 27, 1973, (not the 13th Rev., effective January 1, 1973, as alleged),[3] page No. 46, which contains the rate for Milk, Powdered or Skim, N.O.S. (not Milk compounds), $71.00 per 2000 lbs. as per Item No. 595.

The applicable tariff of N.O.S. rates at the time of all three shipments was the East Coast Colombia Conference Freight Tariff, F.M.C. No. 1, 1st Rev., effective September 29, 1969, page No. 73, which contains the rate for Cargo N.O.S., Not Dangerous, $87.00 per 2000 lbs. Class or Item No. 1. All the aforementioned rates are contract rates.

Complainant contends Lactalbumin is casein and therefore classifiable as powdered milk. The respondent contends Lactalbumin was properly classified as cargo, N.O.S.

Powdered milk is dried milk. *Webster's Third New International Dictionary of the English Language,* 1966 Edition. Casein [is] the chief protein in milk. *Encyclopaedia Britannica,* Volume I, Page 524, 1973 Edition. Albumins are a class of proteins. Among the best known [is] lactalbumin (in milk) . . . Volume V, Page 10, *Ibid.*

In complainant's attachment D, a copy of pages 33 and 34 of a chemical dictionary, Lactalbumin is described as casein coagulated from milk by rennet or by dilute acids, filtered and dried. The coagulation or precipitation of casein from liquid milk is certainly not dehydration as contended by complainant. Powdered milk is produced by dehydration which is the mechanical removal of water. *Britannica,* Volume VII, Page 180. Coagulation or precipitation is the change from fluid to a thickened mass or the separation out in solid form from a solution by means of a reagent. Lactalbumin (casein) is produced by chemical separation or reaction.

Again complainant's attachment D, indicates the use for Lactalbumin is in the compounding of adhesives, varnishes, or ivory substitutes. Moreover, in complainant's attachment G Lactalbumin is listed under "Chemicals", not foods. The commonly recognized use for powdered milk is nourishment. Further evidence of the difference between

[2]Both revisions carried the same commodity description and rate.

[3]Again both revisions carried the same commodity description and rate.

powdered milk and Lactalbumin is the fact that the addition of water to powdered milk reconstitutes it liquid milk, whereas the addition of water to casein would result in neither a potable nor a comestible.

Claims for reparation based on misclassification may be proved by evidence of what was actually shipped, even though the actual shipment may be other than that described on the bill of lading.[4] This is to be distinguished from claims for reparation based on mismeasurement or misweighing.[5] However, the claimant has a heavy burden of proof once the shipment has left the custody of the carrier.[6] Here the burden of proof of showing that Lactalbumin is "a form of powdered milk", has not been met and, accordingly, the complaint is dismissed.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D. C.,
October 18, 1974.

[4] *Western Publishing Company, Incorporated v. Hapag-Lloyd, A. G.*, Informal Docket No. 283(I), 1972.
[5] *Kraft Foods v. Moore McCormack Lines, Inc.*, Docket No. 73-44, March 26, 1974.
[6] *Colgate Palmolive Co. v. United Fruit Co.*, Informal Docket No. 115(I), 1970.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–24

AGREEMENT NO. T–2635–2 PACIFIC MARITIME ASSOCIATION FINAL PAY GUARANTEE PLAN

Agreement No. T–2635–2, which provides for the formula for assessment of PMA members to fund PMA/ILWU Pay Guarantee Plan designed to compensate longshoremen for reduced work opportunities caused by technological advances in the shipping industry and for lack of work arising from conditions for which the industry as a whole is responsible, found lawful with respect to its application to automobiles.

The benefits of doubling productivity through use of Ro/Ro vessels as well as the constantly increasing use of such vessels justify assessment of automobiles at an effective rate one and one-half that imposed on breakbulk cargoes. Responsibility for loss in manhours, moreover, is directly attributable to use of Ro/Ro, a technological advance in automobile carriage. Thus, assessment against automobiles is "reasonable" and proper under section 17, Shipping Act, 1916.

Comparisons of treatment of other categories of cargo demonstrate automobiles treated at least as advantageously under formula as other classes of cargo. Thus, even under broad construction, assessment does not subject automobiles to "any undue or unreasonable disadvantage" within the meaning of section 16, Shipping Act, 1916.

Agreement No. T–2635–2 approved pursuant to section 15, Shipping Act, 1916 as not shown to be contrary to sections 16 or 17 or otherwise violative of that Act.

Edward D. Ransom and *Robert Fremlin* for Pacific Maritime Association and its members.

Herbert Rubin, Cecelia H. Goetz and *Alan A. D'Ambrosio* for Wolfsburger Transport-Gesellschaft m.b.h.

Donald J. Brunner, Paul J. Kaller and *David Fisher* as Hearing Counsel.

REPORT ON REMAND

Jun 23 1975

BY THE COMMISSION: (Helen Delich Bentley, Chairman; James V. Day, Vice Chairman; Ashton C. Barrett, Commissioner) [1]

[1] Commissioner Clarence Morse did not participate.

We instituted this proceeding on May 4, 1973, pursuant to sections 15 and 22 of the Shipping Act, 1916 (the Act), to determine whether, insofar as it applies to the carriage of automobiles, an agreement between the members of the Pacific Maritime Association (PMA) containing a formula by which PMA members are assessed to cover certain longshoremen's benefits under a collective bargaining agreement with the International Longshoremens and Warehousemens Union (ILWU) should be approved under section 15 of the Shipping Act (the Act) or whether, on the contrary, such agreement is unlawful because it is violative of sections 15, 16, or 17 of the Act.

Following the submission of a stipulation of facts, affidavits, depositions, and an evidentiary hearing, Administrative Law Judge Ashbrook P. Bryant (the ALJ) issued an Initial Decision in which he found the PMA assessment formula agreement lawful in its application to automobile carriage. We issued a short order adopting the Initial Decision.

Following a petition to the Court of Appeals for the District of Columbia Circuit to review our order by Wolfsburger Transport-Gesellschaft, m.b.h., (Wobtrans), a shipper of automobiles and a party to this proceeding, we carefully examined our decision and concluded that it might be open to the challenge that it had not fully performed the function of analyzing the assessment formula agreement to determine the relative benefits it granted and burdens it imposed insofar as automobiles are concerned, a function which the Courts have concluded is necessary in considering the lawfulness of agreements allocating assessments. See *Volkswagenwerk v. FMC*, 390 U.S. 261, 282 (1968) *(Volkswagen); Transamerican Trailer Transport Inc. v. FMC*, 492 F.2d 617, 630 (D.C. Cir. 1974) *(Transamerican)*, affirming *Agreement No. T-2336 - New York Shipping Association*, 15 F.M.C. 259 (1972). We therefore moved the Court to remand the proceeding to us for further consideration. Both PMA and Wobtrans supported our motion, and the Court remanded the matter to us.

On January 23, 1975, to insure that the record for decision in this proceeding be as complete as is necessary for resolution of the issue of relative benefits and burdens under the assessment allocation formula agreement with respect to assessments related to the carriage of automobiles, we directed all parties to inform us as to what additional evidence or briefs they wished to submit. Both PMA and Wobtrans responded by stating that they did not wish to submit any additional material and desired to have the proceeding decided upon the existing record.[2]

[2]The Commission's Hearing Counsel, the only other party to this proceeding, did not respond to our invitation with respect to further evidence or briefs, having taken the position earlier in the proceeding that the issue here, concerning only PMA and Wobtrans and not the assessment allocation formula agreement as a whole, and involving

We have accordingly reviewed the entire record, carefully considering all evidentiary materials and arguments of the parties. Based upon such examination and application of the standards enunciated by the Courts in *Volkswagen* and *Transamerican*, we conclude that the assessment allocation formula embodied in Agreement No. T–2635–2 is lawful with respect to its application to automobiles, that it violates neither section 16 nor section 17 of the Act, and that it should be approved pursuant to section 15.

FACTS

The factual background and matters relevant to decision here are, for the most part, adequately set forth in the Initial Decision and, in nearly all instances, have not been excepted to by the parties. Our factual findings here set forth are therefore based largely upon those of the ALJ, but we have supplemented his findings by additional record material, eliminated unnecessary material, and corrected errors.[3]

Agreement No. T–2635–2, entitled "Agreement between members of PMA for funding the longshore pay guarantee plan," was filed December 15, 1972, for approval pursuant to section 15 of the Act. The agreement, if approved, would finalize the assessment formula used in the Interim Pay Guarantee Plan (Agreement No. T–2635) which was first approved by the Commission on May 23, 1972, and then later extended.[4] The Interim Plan has allowed PMA to fund the substantial weekly liability owing to the Plan under the collective bargaining agreement between PMA and the ILWU.

In our order instituting this proceeding, we noted that Wobtrans had filed a protest against the agreement alleging *inter alia* that the assessment formula is discriminatory with respect to automobile cargoes because the liability under the Pay Guarantee Plan is contingent upon the lack of work opportunities, a problem unrelated to the carriage of automobiles and that Wobtrans denies that automobile

only a difference in a few thousand dollars depending upon whether the assessment allocation method supported by PMA or that supported by Wobtrans prevails, does not involve a matter affecting the public interest.

[3]Wobtrans, in its exceptions to the ALJ's Initial Decision, had objected to various findings of the ALJ and his failure to make certain findings which Wobtrans had requested. We have in our factual discussion here, to the extent relevant and supported by the record, corrected and supplemented the factual findings in accordance with Wobtrans' contentions.

[4]Agreement No. T–2635 was originally due to expire on September 30, 1972. By order of the Commission served September 29, 1972, the agreement was extended until December 28, 1972; by order served December 27, 1972, the agreement was extended until June 29, 1973; by further order on May 3, 1973, it was extended to December 31, 1973, and by order of December 27, 1973, the agreement was extended until such time as the Commission approves, disapproves or modifies Agreement No. T–2635–2.

carriage receives any benefits proportionate to the burden of assessment. Also, we directed that a determination be made whether automobiles are subject to any undue or unreasonable disadvantage because of the assessment in violation of section 16 of the Act or such assessment is an unreasonable practice related to receiving, handling, storing, or delivering property in violation of section 17.

The Parties

PMA is a corporation composed principally of stevedore companies and steamship lines and their agents doing business on the West Coast of the United States. Its main business is to represent its members in negotiations with various maritime unions, among which is ILWU, and to establish policy for its members in matters involving labor and labor controversy. As of early 1973, 126 companies were members of PMA.

Wobtrans is a corporation organized and existing under the law of the Federal Republic of Germany with its principal place of business in Wolfsburg, Germany. It operates vessels engaged in the transport of vehicles from Germany to the Pacific Coast ports, among other places. The cargo is largely if not exclusively Volkswagen automobiles. Wobtrans is not a member of PMA but would be eligible for membership if it became a direct employer of longshore labor. However, the stevedores handling the cargoes of Wobtrans are members of PMA and accordingly are assessed by PMA on the automobiles handled by them.

Wobtrans does not pay any assessments to PMA under Agreement No. T–2635–2. Assessments against Wobtrans' stevedore contractors may, because of economic necessity, be passed along to Wobtrans. The manner and amount in which such charge is passed along is negotiated between Wobtrans and its stevedores. We here assume that the entire amount of assessment is passed on to Wobtrans by its stevedore contractors.

Background of the Agreement

PMA and ILWU have entered into a number of collective bargaining agreements going back over many years, in which fringe benefits have progressively been included.

In 1960, PMA and ILWU agreed upon a new 5 1/2 year fringe benefit plan, the Mechanization and Modernization Fund (M & M or Mech Fund), which included early retirement, supplemental retirement and pay guarantee benefits.[5] The ILWU agreed to the in-

[5]Another M & M Agreement was entered into in 1966 to run for another five years.

troduction of labor-saving devices and the elimination of certain restrictive work practices. In return PMA agreed to create the M & M fund to mitigate the impact upon employees of technological unemployment. This agreement has been referred to by the Supreme Court of the United States as "a milestone agreement which, it was hoped, would end a long and troubled history of labor discord on the West Coast waterfront." (*Volkswagen* at 263–264.) The funding of the M & M Agreement was left to PMA, rather than made a part of the collective bargaining agreement. A determination as to the best and most efficient method of funding the M & M Agreement presented PMA with several novel and difficult problems.

In 1960, although mechanized operations had begun on the West Coast, such as the introduction of packaged loads and packaged lumber, a general mechanization of the industry had not yet taken place. The most obvious innovation had been the introduction of container service by Matson Navigation Company (Matson), a PMA member. As a consequence, in 1960 and 1961, few, if any, of the West Coast vessel operators, save Matson, looked for savings in manhours because of mechanization. Therefore the PMA members were divided into two groups with opposing interests. One group, including Matson, anticipated imminent, substantial manhour savings because of its containerized service. The second group, representing more than 90 percent of the steamship company members of PMA, anticipated that for the immediate future their operations would continue to be a conventional breakbulk cargo handling type of operation. This second group opposed a manhour assessment basis for funding the M & M Agreement because, under such an assessment, their labor costs per ton would increase as a carrier with an innovative operation reduced its manhours per ton.

To determine an appropriate method of funding the M & M Agreement, PMA formed the M & M Funding Committee which considered a number of alternative assessment methods. The Committee finally adopted a tonnage formula which had been used for a number of years to collect PMA dues. The Committee was not completely satisfied with the assessment formula but believed it to be the best available solution.

Tonnage was determined for the PMA assessment by the manner in which a particular type of cargo was manifested for shipment, except automobiles, which were assessed on the basis of measurement tons, regardless of how manifested. Automobiles can be manifested by weight, by measurement or by unit. In the foreign trades automobiles are manifested on a unit basis on chartered ships, but weight and

sometimes measurement is shown. In the coastwise trade autos are manifested and freighted by weight.

The decision to collect the M & M fund through a tonnage assessment rather than a manhour assessment was due to the belief of the breakbulk operators who constituted the bulk of the membership of PMA that increased containerization was going to reduce total manhours.

PMA refused to make any exception to its uniform tonnage tax although it was aware that such inflexibility was unsatisfactory. It refused to do so on the ground that it was unable to arrive at a rationale for determining how exceptions should be made.

At the time, a Volkswagen vehicle had an average measurement tonnage of 8.7 tons (40 cubic feet equals 1 ton) and a weight tonnage of 0.9 tons (2,000 lbs. equals 1 ton). Thus, an average Volkswagen vehicle had a measurement tonnage approximately ten times its weight tonnage. Vehicles carried by Wobtrans presently have an average measurement tonnage of 8.577 tons (40 cubic feet equals 1 ton) and a weight tonnage of 1.075 tons (2,000 lbs. equals 1 ton). Thus an average vehicle carried by Wobtrans has a measurement tonnage approximately 8 times its weight tonnage.

PMA did not submit its assessment plan to the Federal Maritime Commission for approval in accordance with section 15 of the Act, and such approval was not given prior to the time such arrangement was put into execution. When Volkswagen, which was then shipping its vehicles itself, refused to pay the PMA tonnage tax, PMA brought suit against the stevedores handling its cargo for the monies due. While this litigation was pending, the amount of the tax was paid into an escrow fund.

In January 1963, Volkswagen filed a complaint with the Commission challenging the underlying agreements among members of PMA and the acts taken in execution of such agreements as violating sections 15, 16, and 17 of the Act. PMA made itself a party to this proceeding by intervening. Hearings were held on June 4, 1964. The Examiner found the PMA assessment funding agreement not subject to section 15 and not violative of sections 16 or 17. The Commission agreed and dismissed the complaint.[6] The Court of Appeals for the District of Columbia Circuit affirmed the Commission.[7]

On March 6, 1968, the Supreme Court (in *Volkswagen*) reversed the Commission and the U.S. Court of Appeals, and held the assessment funding agreement to be subject to section 15, and directed that the case be remanded for further proceedings to determine whether the

[6] *Volkswagenwerk Aktiengesellschaft v. Marine Terminals*, 9 F.M.C. 77 (1965).
[7] *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 371 F.2d 747 (D.C. Cir. 1966).

agreement should be disapproved because of its effect on automobile cargoes. The Court pointed out:

> When the vehicles were assessed for the Mech Fund by measurement, the assessment came to $2.35 per vehicle—representing, if passed on to the petitioner, an increase in unloading costs of 22.5%. If the vehicles had been assessed by weight (0.9 tons) rather than by measurement (8.7 tons), the assessment would have been 25¢ per vehicle—an increase of about 2.4%, comparable to the average Mech Fund assessment of 2.2% for all other general cargo. Assessment by measurement rather than by weight thus resulted in an assessment rate for the petitioner's automobiles of 10 times that for other West Coast cargo—although automobiles had less to gain than other cargo from the Mech Fund Agreement. (at 265–266).

On March 11, 1968, the PMA filed two documents with the Commission covering the funding of longshore benefits under the M & M fund agreement for the period from June 10, 1966, to June 30, 1971.[8] Assessments were to be made for the benefit of walking bosses, longshoremen, and clerks. Bulk cargo was exempted from the assessment for walking bosses, which was made on a tonnage basis. The portion of the fund applicable to clerks was to be raised by a manhour assessment proportionate to clerk manhours to total manhours. All this corresponded to PMA's original cooperative working arrangement.

The Commission, with the consent of Volkswagen (which protested the automobile assessment) and Matson (which protested the assessment of cargo in containers), approved the agreements upon the condition that retroactive adjustments would be made in the assessments if necessary, and instituted an investigation to determine whether the assessment agreement met the requirements of the Shipping Act as interpreted by the Supreme Court.[9] However, in the same order, the Commission strongly urged the parties to negotiate and settle their differences. As a result of the Commission's urging, PMA requested Sam Kagel to act as an impartial umpire to determine a binding assessment formula for the funding of the M & M Agreement. Its purpose was to arrive at a satisfactory solution of the conflict between the conventional and innovative cargo handling points of view as described above.

Sam Kagel, an arbitrator and mediator of national reputation and wide experience in many industries including the maritime industry, was asked by PMA to make a final and binding determination of an assessment formula, subject to approval thereof by the Commission, which would fairly distribute the cost of the M & M Agreement and

[8] "MEMORANDUM OF AGREEMENTS BETWEEN MEMBERS OF PACIFIC MARITIME ASSOCIATION REGARDING LABOR COST ASSESSMENTS," F.M.C. Agreement No. T-2148 and "MEMORANDUM OF AGREEMENTS BETWEEN MEMBERS OF PACIFIC MARITIME ASSOCIATION REGARDING LABOR COST ASSESSMENTS RELATED TO VEHICLE HANDLING," F.M.C. Agreement No. T-2149.

[9] Docket No. 68-18, *Order of Approval and Notice of Investigation*, March 28, 1968.

would not fall unfairly upon the stevedoring operations of any particular shipper nor place an unfair, undue or unreasonable burden on any particular stevedoring operation. Kagel was also instructed that any formula he recommended had to be compatible with the "benefit/charges" test announced by the Supreme Court in its decision in the *Volkswagen* case. He was also specifically directed to solicit the views of Volkswagen and its stevedores, as well as all other segments of the industry. Kagel arranged numerous meetings with representatives of all segments of the industry. He met on a number of occasions with attorneys for Volkswagen and also on several other occasions discussed their views by telephone and by correspondence.

Kagel encountered many basic disagreements between the members of the industry as to what would be an appropriate funding formula. The breakbulk carriers disagreed with the position of the container operators, and different positions were taken by carriers of bulk cargo, lumber, vehicles and other specialty carriers and shippers. Kagel's major role was to act as a mediator between the various conflicting segments of the industry.

A principal goal in arriving at a new assessment formula was to reduce Volkswagen's costs—a result which as a practical matter Kagel took to be a main thrust of the Supreme Court's opinion. This result he accomplished. Kagel stated:

> One of my primary objectives was to reduce the cost to Volkswagen, because but for the Volkswagen decision out of the Supreme Court I am assuming that that assignment would never have been made, so far as I was concerned.
>
> And so the name of the game . . . was very clearly, "How could I redistribute the costs," so that Volkswagen's costs would be substantially less than it had been prior to that decision.

On September 16, 1968, Kagel issued his report, in which he determined that the M & M Funding Agreement should be amended by, among other things, introducing two new cargo categories, namely, automobiles and cargo in containers.

According to Kagel, the only feasible method of solving the problem was to meet with each of the several groups with variant interests and to work out a formula which would be at least acceptable to all of the parties. The result was not a "scientific formula" but something:

> . . . that the parties all could live with, and most of them didn't like, particularly those elements in the industry which had to pay more than they had paid previously, they obviously didn't like that.

In the course of the negotiations Volkswagen advised Mr. Kagel that assessment by weight tonnage rather than measurement would meet its objection to the formula and would conform to the

Supreme Court's instruction. Alternatively, Volkswagen proposed that automobiles should receive the same treatment as bulk cargo. Kagel considered these suggestions in the light of all the circumstances and the need for agreement. In the formula recommended by Kagel automobiles and trucks were assessed for the Mech Fund on a measurement ton basis but at one-fifth the amount paid by general cargo. The tonnage assessment contribution for bulk cargo, which had been one-fifth the general cargo rate under the earlier funding agreement, was reduced to one-seventh the amount paid by general cargo. Cargo in containers was assessed at seven-tenths the general cargo rate. Reductions were made on the assessments against bulk cargo because it seemed likely to benefit little from new mechanization because it was already highly mechanized and on container cargo because by 1966 containerized carriage had expanded to the extent that much less further mechanization was likely in the future. Reductions for bulk and container cargoes also helped to secure the agreement of their carriers to a change in the PMA tax on automobiles. Another reason for reducing the tax on container cargo was to compensate for the money and capital investment involved in this type of transportation.

When Mr. Kagel was asked how he arrived at these fractions he answered:

> And when you ask me how did I arrive at one-seventh or one-tenth or one-fifteenth, I didn't arrive at that, I worked it out between the parties.

Kagel found his recommended formula to be in accordance with the correlation of benefits and burdens under the agreement as required by *Volkswagen*.

According to Wobtrans, Kagel's formula ameliorated but did not eliminate the disproportionate increase in labor costs experienced by automobiles as compared with general cargo due to the Mech Fund assessment. Volkswagen agreed not to oppose approval by the Commission of the revised M & M assessment formula but simultaneously put on the record that its acquiescence was not intended to foreclose it with respect to any other or future proceedings. Among the reasons for this agreement not to oppose Kagel's report were: (1) Volkswagen would receive a substantial sum of money held in escrow pending resolution of the dispute; (2) Volkswagen was anxious to cooperate in the achievement of stable and peaceful labor conditions on the West Coast. Although it felt the new agreement was not entirely in accord with the Supreme Court opinion, Volkswagen accepted Kagel's formula as doing rough justice.

PMA filed Kagel's modifications in a single agreement covering all

cargoes including automobiles. The Commission in approving this new agreement said:[10]

> Agreement T-2210 differs from the two earlier agreements in establishing lesser assessment for certain types of cargo than the assessments against general cargo. Bulk cargo is assessed at 1/7, automobiles and trucks exclusive of truck trailers at 1/5 and cargoes in containers at 7/10, the general cargo rate.
>
> No party to this proceeding voices any objection to the new method of assessment. Furthermore the method embodies what appears to be a reasonable compromise of the positions of the various parties, which the Commission encouraged in its order instituting this proceeding, and was determined by the arbitrator to be in accordance with the guidelines enunciated in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), the case which held that the Commission had jurisdiction over PMA's assessment agreements and directed the Commission to examine their lawfulness. . . .

The Commission expressed the caveat that its approval of the agreement:

> . . . does not, of course, prevent the Commission's further consideration of the lawfulness of the assessments provided therein should consideration in the future appear proper.

Pay Guarantee Plan and its Background

In 1969, PMA and ILWU began negotiating with respect to the collective bargaining agreement to succeed the agreement due to expire on June 30, 1971. Both PMA and ILWU anticipated a continuous decline in the need for longshore labor in the Pacific Coast ports because of anticipated increases in productivity, primarily containerization.

By 1968, average longshore productivity on the Pacific Coast had substantially increased from its Mech Fund level. Whereas in 1960 and 1961, only .84 tons were being discharged per manhour, by 1968, this figure had increased to 1.5 tons, just short of twice the earlier figure.

The principal change involved in automobile handling subsequent to the Mech Fund was the introduction of specially designed vessels from which automobiles can be rolled on and off [Ro/Ro] instead of being lifted on and off through the use of ship's gear [Lo/Lo]. Ro/Ro carriage requires specialized vessels and new capital investment. Although the productivity of automobile carriage has increased somewhat because of the use of better equipment on Lo/Lo movements, the major increase in productivity has come from the use of Ro/Ro vessels.

The difference in productivity between the Lo/Lo carriage and Ro/Ro can be seen from Wobtrans' experience in handling vehicles in

[10]Docket No. 68-18, *Approval of Agreement T-2210 and Discontinuance of Proceeding*, January 17, 1969, p. 2.

the Port of Los Angeles and the Port of San Francisco. Ro/Ro operations are more than two but less than three times as productive as conventional automobile carriage.[11]

The innovative cargo handling methods permitted by the Mech Fund resulted in steadily increasing average productivity on the Pacific Coast. Productivity had risen 300% since the original adoption of the Mech Fund in 1960–61 and 200% since the extension of that fund in 1966. This increase in productivity has resulted in a decline in manhours of employment on the Pacific Coast despite a steady increase in tonnage every year, except 1971, when a strike disrupted the waterfront. Following a small decline immediately after the adoption of the Mech Fund in 1961, hours worked in the Pacific Coast ports remained steady or increased until 1970 when they experienced a sharp decline.

Manhours declined between 1969 and 1970 despite an increase in total tonnage of two million tons and declined further in 1972, the next non-strike year, while total tonnage dropped only insignificantly. Although two million more tons were handled on the Pacific Coast in 1972 than in 1969, total manhours of employment have dropped almost one-third. Both the increase in average productivity and the sharp decline in manhours employment reflect the increase in container carriage.

From 1964 to 1973 there has been a decrease in manhours used per ton loaded or discharged without an offsetting increase of total tons handled. All categories of cargo have experienced a decrease in manhours used per ton loaded or discharged by reason of elimination of restrictive work practices and/or by reason of the introduction of new cargo handling equipment or methods.

By 1969 container cargo represented 1/4 of all general cargo entering or leaving Pacific Coast ports other than logs and lumber and automobiles. Between 1969 and 1972 the amount of container tonnage transported through Pacific Coast ports almost doubled, increasing from somewhat more than six million tons to twelve million tons, while breakbulk carriage suffered a corresponding decline from nineteen million tons to little less than twelve and one-half million tons.

Automobile tonnage remained relatively stable between 1962 and

[11] Wobtrans Productivity (1969–1972)

	Manhours per ton	*Tonnage per manhour*
Lo/Lo		
San Francisco	.103	9.69
Los Angeles	.085	11.84
Ro/Ro		
San Francisco	.049	20.47
Los Angeles	.037	27.30

The record shows that the productivity of breakbulk is 1.16 tons per hour (.86 manhours per ton).

1963 (1,434,704 and 1,554,429, respectively) increased about 1/3 in 1964 (1,969,937), increased about another 1/6 in 1965 (2,333,695), remained about the same by the end of 1967 (1966—2,790,661; 1967—2,445,764), increased about another 2/5 in 1968 (to 3,433,662), another 2/7 in 1969 (to 4,384,191), remained relatively constant in 1970 (4,524,600), and increased very slightly over the 1970 level in 1972 (to 5,233,750).[12] Wobtrans has in the past few years accounted for a relatively small and diminishing percentage of the Pacific Coast automobile movement (1969–28%; 1970–24%; 1971–21%; 1972–14%). During the last ten years, there has been a steady increase in the number of Japanese and other imported vehicles, in addition to those carried by Wobtrans, entering Pacific Coast ports. The movement of automobiles from Japan constitutes the bulk of Pacific Coast automobile movement, and is predominantly a Ro/Ro operation.[13]

Although the record herein shows that Ro/Ro vessels were introduced by Wobtrans on the West Coast about 1965, no great or consistent use was made of them until 1969. Wobtrans used no Ro/Ro vessels on the West Coast in 1968.

The cost per manhour of PMA's assessment has steadily increased for all cargo because of the increase in productivity and the decline in manhours of employment. In 1961, when the Mech Fund was first adopted, manhour assessments for fringe benefits constituted only slightly more than 10 percent of total direct labor cost per manhour; by 1969, such assessments represented close to 20 percent.

In 1963 Wobtrans employed 2,400 ganghours to discharge its cargoes; in 1972, it employed 3,375 ganghours or roughly 25 percent more labor.

One of the purposes of the M & M Agreement had been to encourage the adoption of labor-saving devices on the West Coast. Hence, it became important to furnish some form of pay guarantee to insure workers a guaranteed income as work opportunity diminished. The concept of pay guarantee had actually been part of the first five-year M & M Agreement. A substantial portion of the Pay Guarantee Plan was modeled on the pay guarantee language of the original M & M Agreement.

When PMA and the ILWU began negotiations for a new contract in 1970, it was clear that some type of Pay Guarantee Plan in lieu of the

[12]We agree with the parties that statistics for 1971 are in general unreliable and may be atypical because 1971 was a strike year. (The automobile tonnage in 1971 was 4,805,033.)

[13]Although the evidence that the Japanese automobile movement is predominantly Ro/Ro is contained in the "non-evidentiary" portions of the record (i.e., Opening Brief of Wobtrans, page 28; Transcript of Oral Argument, page 23), it may be taken as well-founded, coming (as it does) from Wobtrans, being detrimental to its own financial interest (i.e., the Japanese automobiles have multiplied to the detriment of Wobtrans' market share), and being uncontradicted.

M & M Agreement would be a necessary part of the collective bargaining agreement. The negotiations resulted in PMA-ILWU Memorandum of Understanding of February 10, 1972, and the Pay Guarantee Plan which was incorporated therein was, in effect, an extension of the M & M Agreement. The February 10, 1972, Pay Guarantee Plan created a contingent liability of $5,200,000 payable at the rate of $100,000 per week contingent upon lack of work opportunities. The plan guaranteed 36 straight time hours per week to "A" men and 18 straight time hours per week to "B" men. The method of raising contributions to meet the guarantee was again left to the determination of the employers. Liability under the plan is contingent on lack of work opportunities.

By a Memorandum of Understanding, dated June 24, 1973, the Pay Guarantee Plan was extended, and the employers' annual commitment was increased from $5,200,000 to $6,000,000. Also, the liability became fixed instead of contingent as it was under the original Pay Guarantee Plan.

Although diminishing work opportunity was one of the principal concerns of the ILWU in seeking a Pay Guarantee Plan, the benefits which longshoremen receive under the plan are not solely related to declining work opportunity.

It is unlikely that the Pay Guarantee Plan will be discontinued when there is sufficient work for all longshoremen, and in fact there is presently, and was in 1972, sufficient work for most of the established work force. The principal concerns of the ILWU in negotiating the Pay Guarantee Plan, in addition to diminishing work opportunity, were: (1) the highly seasonal nature of longshoring in some ports; (2) the fact that longshore work comes in peaks and valleys because ships often arrive in groups or not at all; and (3) the danger that trades may dry up and ports may die.

The Pay Guarantee Plan provides basic worker security as important to a longshoreman as is his employment in the industry. It covers not only benefits brought into being because some cargoes create diminishing work opportunities; it creates benefits to compensate for a lack of work arising from conditions for which the industry as a whole is responsible.

Pay Guarantee Plan Assessment Agreement

When the Pay Guarantee Plan in the Memorandum of Understanding of February 10, 1972, was ratified, PMA had to determine an assessment formula to fund the benefits under the plan. Pending the determination of a final formula to fund the Pay Guarantee Plan, PMA

decided to adopt an interim funding method based upon the formula approved for the M & M Agreement. This interim funding formula was incorporated into Agreement No. T-2635, which provided for interim funding to September 30, 1972, which as above noted has been extended from time to time. The Executive Committee of PMA acted as a "Funding Committee" to consider the manner in which longshore fringe benefits should be assessed under the Pay Guarantee Plan and the other fringe benefit plans. The Committee's discussions were similar to those of the original M & M Funding Committee. Once more, there were two conflicting interests—the conventional operator and the container operator. By this time, however, many of the operators who had been in the first group were now in the second, and consequently a far lesser proportion of the membership was concerned about the effects of a manhour assessment. It became evident after a number of meetings that the Executive Committee could not reach a consensus, and Kagel was asked by PMA to consider the problem and make an appropriate recommendation.

Unlike Kagel's role in connection with the M & M assessment agreement, as to which he was asked to make a final and binding assessment determination, Kagel was retained by PMA in an advisory capacity to act as an impartial umpire in recommending a Pay Guarantee assessment formula. Upon his appointment on April 20, 1972, Kagel solicited the views of all segments of the industry to assist him. In Kagel's letter to industry representatives, he listed alternative funding methods—namely, an hourly method, a tonnage method, and an hour-ton method—which had been considered by various study groups, and he discussed these three principal funding methods in his letter. Kagel received many responses to his letter from members of the industry in which various positions were taken as to an appropriate funding method. He circulated these responses to all parties who had replied to his initial inquiry, and received no further comments.

Volkswagen, through its attorneys, communicated with Kagel by letter and by telephone on several occasions to present its views. One of Volkswagen's contentions was that the carriage of automobiles was not responsible for a decline in manhours. Volkswagen also asserted that the problem before Kagel was similar to the problem raised by the automobile assessment formula of the New York Shipping Association (NYSA) and submitted for Mr. Kagel's review Volkswagen's exceptions to the Hearing Examiner's Initial Decision in the *NYSA* case and its reply to the other exceptions filed in that proceeding.

In addition to his discussions with Volkswagen and other industry representatives and his study of the industry's views submitted to him, Kagel also reviewed the materials which were presented to him in

his investigation and determination of the M & M funding formula.

On November 21, 1972, upon completion of his investigation, Kagel issued his recommendations for funding the Pay Guarantee Plan. He recommended that the funding formula for the M & M Agreement be adopted for the Pay Guarantee Plan, because he found that it was fairer than any other method and because, in particular, automobiles benefitted in proportion to the burdens imposed by reason of the employment of Ro/Ro technology and more efficient use of manpower which would have been impossible in the absence of the collective bargaining agreement. As a result, automobiles and trucks, exclusive of trailers, would be assessed on a measurement ton basis but at 1/5 of the assessment rate for general cargo; bulk cargo would be assessed 1/7 of the general cargo assessment; and container cargo would be assessed 7/10 of the general cargo assessment. Contributions for the benefit of clerks would be made on a manhour basis. Kagel's recommendation was approved by PMA, and the Memorandum Agreement approving his recommendation is Agreement No. T-2635-2, which is the agreement pending before the Commission in this proceeding.

In December 1972, PMA, at Kagel's recommendation, determined to fund the Pay Guarantee Plan by the same funding formula used during the interim period and set forth in No. T-2635, and on December 15, 1972, filed with the Commission Agreement No. T-2635-2. No. T-2635-2 recites that the funding formula expressed in No. T-2635 is adopted "until termination of the aforesaid ILWU-PMA Pay Guarantee Plan and extensions thereof." The PMA-ILWU memorandum of February 10, 1972, had an expiration date of July 1, 1973. As noted above, on June 24, 1973, PMA and ILWU entered into a new "Memorandum of Understanding" to expire June 30, 1975, which increased the amount available to the "Pay Guarantee Plan" during the two years life of that agreement to a fixed fund of $6,000,000 each year. PMA has continued the funding formula of the interim agreement and Agreement No. T-2635-2 for funding of the pay guarantee plan under the 1973 collective bargaining agreement.

Computations Relating to Automobile Carriage and Assessments

Total vehicles discharged by Wobtrans at West Coast ports in 1972 were:

Port	*Total Number of Vehicles*
Los Angeles	45,977
San Francisco	31,219
Columbia River and Portland	6,483
Seattle	4,086

Lo/Lo unloading costs per vehicle were:

Port	*Unloading Costs Per Vehicle*
Los Angeles	$ 8.11
San Francisco	10.13
Columbia River	8.16
Seattle	8.69

PMA asserts on the basis of the above figures the weighted average unloading cost per vehicle discharged from Wobtrans' vessels in 1972 was $8.86: the Pay Guarantee Plan assessment (as of August 4, 1973) for automobiles was $.032 per ton; since an average Wobtrans vehicle measures 8.577 tons, the Pay Guarantee assessment on an average Wobtrans vehicle is 8.577 × $.032, or $.274 per vehicle. The clerk-manhour assessment for the Pay Guarantee Plan, as of August 4, 1973, was $.29 per hour. In the San Francisco Bay area, for 1972, Wobtrans stevedore, Marine Terminals, discharged an average of 0.96 vehicles per manhour. Consequently, PMA says that if Wobtrans had been assessed on a manhour basis, the per vehicle assessment for its operations in San Francisco for 1972 would have been $0.29 divided by 0.96, or $.302. The per vehicle assessment for Ro/Ro operation in San Francisco in 1972 would have been $0.29 divided by 2.30 or $.126. At Los Angeles on a manhour basis Wobtrans would have paid $.207 on Lo/Lo carriage ($0.29 divided by 1.40) and $.096 on Ro/Ro ($0.29 divided by 3.013). The total of Wobtrans' vehicles discharged at West Coast ports was 87,765 vehicles in 1972, and an average Wobtrans vehicle measures 8.577 tons. Therefore, the total measurement tonnage of Wobtrans' vehicles discharged on the West Coast in 1972 was 752,760 revenue tons. The total PMA tonnage handled at West Coast ports in 1972 was as follows:

	Revenue Tons
Automobiles	5,233,750
General Cargo, including automobiles	36,002,287
All Cargo	59,437,877

Wobtrans' vehicles discharged in 1972 therefore comprised only 14 percent of the total automobile tonnage, only 2.1 percent of the general cargo tonnage, and only 1.3 percent of all cargo.

As to the relative amount of Wobtrans' assessment, the total PMA tonnage for 1972 (weighted to account for differing assessments on different classes of cargo) was 31,493,506 revenue tons. The total assessments under Agreement No. T-2635-2 for all cargo was $5,038,960. Wobtrans' assessment for the 752,760 revenue tons carried in 1972, at $.032 per ton, was $24,088. Thus, Wobtrans' assessment for 1972 was only .48 percent of the total assessments—even though it represented 1.3 percent of all cargo carried. (If experience proves that the assessment rate at $.16 per ton will result in more than the re-

quired $6,000,000, all per-ton rates will be proportionately reduced.

Beginning in 1969 there has been a steady increase in Wobtrans' use of Ro/Ro vessels as shown by the following summary:

Total Movements

Year	*Lo/Lo*	*Ro/Ro*	*% Ro/Ro of Total*
1969	138,561	2,466	1.75
1970	118,011	11,037	8.55
1971	107,504	11,247	9.47
1972	67,618	20,147	22.96

The difference in productivity in San Francisco for Wobtrans' Lo/Lo and Ro/Ro vessels for 1972 was as follows:

Vehicles Per Manhour-Lo/Lo	*Vehicles Per Manhour-Ro/Ro*	*Increase in Productivity*
0.96	2.30	2.40 times

At Los Angeles in 1972 Ro/Ro productivity exceeded Lo/Lo productivity 2.15 times. Figures for the period 1969–1972 show that Ro/Ro operations are more than two but less than three times as productive as conventional automobile carriage.

PMA submits the history of Wobtrans' tonnage decline since 1969 as follows:

Decline in Wobtrans' Tonnage

Year	*Vehicles*	*Tonnage*
1969	141,027	1,209,588
1970	129,048	1,106,845
1971	118,731	1,018,527
1972	87,765	752,760

[Wobtrans expected an increase in manhours and tonnage in 1973.]

The Joint Stipulation of Facts submitted by the parties to this proceeding includes a productivity figure for automobiles of 8.6 tons per manhour as of 1972. Using this figure, PMA calculates the decline in manhours resulting from Wobtrans' decreased carryings since 1969 can be approximated as follows:

Decline in Manhours

Year	*Total Tonnage*	*Total Manhours*
1969	1,209,588	140,650
1970	1,106,845	128,703
1971	1,018,527	118,433
1972	752,760	87,530

Using a 2.56 comparative ratio between Lo/Lo and Ro/Ro productivity figures (a not unreasonable figure for a productivity ratio between two and three and reaching as high as 2.88), PMA figures the

loss in manhours from Wobtrans' use of Ro/Ro vessels since 1969 can be estimated as follows:

Loss in Manhours Due to Wobtrans' Ro/Ro Carriage

Year	Ro/Ro Vehicles	Manhours (If Lo/Lo)	Actual Ro/Ro Manhours	Loss in Manhours
1969	2,466	2,459	961	1,498
1970	11,037	11,007	4,300	6,707
1971	11,247	11,217	4,382	6,835
1972	20,147	20,093	7,849	12,244

A summary of approximate decline of manhours (using 1969 as a base year) resulting from (a) Wobtrans' decreased carryings, and (b) its shift to Ro/Ro vessels, is as follows:

Total Decline in Manhours

Year	By Decrease in Carryings[1]	By Shift to Ro-Ro Vessels	Total Loss in Manhours
1970	11,947	6,707	18,654
1971	22,217	6,835	29,052
1972	53,120	12,244	65,364

If other productivity ratios suggested by the record are used, similar losses of manhours resulting from Wobtrans' increasing shift to Ro/Ro vessels are revealed. Thus, if the four-year (1969–1972) average productivity for Ro/Ro vessels for the years 1969–1972 is used (2.21),[14] the total loss of manhours due to Wobtrans' decreased carryings and shift to Ro/Ro vessels in 1970, 1971, and 1972 is 107,286, a difference of only 5% from the loss of 113,070 manhours based on the 2.56 productivity ratio. Similarly, if the 2.40 productivity ratio for San Francisco for 1972 is used, the total loss of manhours caused by Wobtrans' decreased carryings and shift to Ro/Ro vessels for 1970, 1971, and 1972 is 110,428, a difference of only 2% from the 113,070 figure.

Longshore labor costs on the West Coast have increased from $4.13 per hour in 1960 to $8.86 per hour in 1972. PMA asserts, however, that Wobtrans' per hour labor costs have decreased below the $4.13 level of 1960, at least with respect to the Ro/Ro carriage the employment of which was made possible by virtue of the Pay Guarantee Plan and its predecessors. The unloading cost per vehicle for Lo/Lo vessels was $8.86 in 1972. The discharge rate for Lo/Lo vessels in San Francisco in 1972 was 0.96 vehicles per manhour, and for Ro/Ro vessels, 2.3 vehicles per manhour. The reciprocal of these figures is manhours per vehicle, which is 1.04 for Lo/Lo vessels, and 0.43 for Ro/Ro vessels. Therefore, the labor cost per hour for Lo/Lo vessels in 1972 was $8.86

[14]This figure is based upon the operations at San Francisco and Los Angeles since precise productivity figures are not available for Seattle and Portland, the other West Coast ports through which Wobtrans' vehicles enter. As Wobtrans acknowledges, however, "the record shows that productivity in these ports was comparable to that in Los Angeles and San Francisco . . ." (Exceptions of Wobtrans, p. 59).

divided by 1.04 (manhours per vehicle), or $8.52 per hour. Since labor costs per manhour are constant, the labor cost per vehicle for Ro/Ro vessels in 1972 was $8.52 × 0.43 (manhours per vehicle) or $3.66. Wobtrans states, and the record supports a finding that, the per-vehicle labor rate in 1960 was $4.26. Consequently, PMA asserts, Wobtrans' use of Ro/Ro vessels has enabled it to reduce its per-vehicle labor costs from $4.26 in 1960 to $3.66 in 1972, a reduction of 14%.

Discussions and Conclusions

Wobtrans' position basically is that the assessment formula is unlawful and should not be approved pursuant to section 15 because it creates an unreasonable practice by imposing a burden on automobiles out of proportion to the benefits received contrary to section 17 and unduly or unreasonably disadvantages automobiles vis-a-vis other categories of assessed cargoes contrary to section 16.

At the outset of our discussion of the lawfulness of the assessment formula as it applies to automobiles, it is necessary to articulate clearly the legal standards by which the application of such assessment formula should be judged.

Insofar as section 17 is concerned, the Supreme Court has explained that in order for an assessment to be reasonable as applied to a particular category of cargo "the correlation of . . . benefit to the charges imposed . . . [must be] reasonable . . . and the charge . . . [must be] reasonably related to the service rendered." *Volkswagen* at 282. The impact of the assessment, rather than the intent with which it is imposed, determines its lawfulness, and the benefits and burdens must be related in a more exact manner than a mere finding that a certain category receives "substantial" benefits under assessments. *Id.*

In his concurring opinion in *Volkswagen*, Mr. Justice Harlan observed that since "there was no 'perfect' way to apportion the costs" (at 293), "charges need only be 'reasonably' related and not perfectly or exactly related . . ." (at 295.) In making the determination of the reasonableness of the relation of benefits to burdens, Mr. Justice Harlan suggested that "inquiry [should be made] whether charges are as appropriately proportioned as would be feasible." (at 294.)

Insofar as section 16 is concerned, the majority of the Supreme Court in *Volkswagen* left open the question of its application to assessment allocation agreements and offered no guidance as to the standards to be used if the Commission found it applicable. Mr. Justice Harlan also left the question open, noting only that in considering the application of section 16 the Commission should inquire "whether

special treatment for . . . [a certain] class of goods was necessary under the circumstances and, if so, whether the special rule adopted was the fairest that could be devised." (at 294.)

The U.S. Court of Appeals for the District of Columbia Circuit has further clarified and elaborated on the standards for determining the propriety of assessment allocations in *Transamerican Trailer Transport, Inc. v. F.M.C.*, 492 F.2d 617 (D.C. Cir. 1974) *(Transamerican)*, a decision affirming the Commission's actions with respect to assessments for longshoremen's benefits in the Port of New York, *Agreement No. T-2336—New York Shipping Association*, 15 F.M.C. 259 (1972). As that Court observed:

> The increased fringe benefit costs, in part a reflection of the union's concern that port modernization will lead to excessive job displacement, must be divided among a group of employers whose labor productivity varies significantly. In this context, precise calculations are elusive, and absolute equity is beyond concrete demonstration. At best, the assessment agreement must represent a compromise of sorts. (at 620.)

Moreover, the Court in *Transamerican* observed, with specific reference to automobiles, that the Commission had acted properly in determining the propriety of the assessment allocation when it "evaluated the numerous suggested assessments for automobile cargoes and weighed the nature of the burdens imposed by each against the nature of the benefits received by the automobile interests." (at 630.)

Applying the above standards to the assessment allocation formula here in issue, we conclude that its application to automobiles is "reasonable" within the meaning of section 17.

As Wobtrans itself admits, in general a formula based on manhours in whole or in part is unfair because it assesses least those who have benefitted most under an assessment plan for labor benefits, namely those who have been able to increase productivity by decreasing manhours through the use of mechanization. (See Wobtrans' Exceptions to the Initial Decision, pages 29–30, 57.) [15] On the other hand, a tonnage basis for assessments provides the basis for more nearly relating burdens imposed under an assessment plan both to benefits received under the plan because of increased productivity and to responsibility for such increased productivity. In other words, since burdens under the plan are based on amount of tonnage carried, assessments will vary directly in accordance with the increase in productivity (or decrease in manhours) and will impose the greatest burden on those categories

[15] A manhour basis for assessment may be proper in particular instances, among which are the prevention of diversion of a certain category of cargo from a port which could be caused by a tonnage assessment, and the protection against payment by certain cargoes for the failure of a port to maintain a minimum number of hours of longshore labor, for which failure such categories of cargo are not responsible. See *Transamerican* at 627. No one contends, nor do we find, that a manhour basis for assessment is proper here.

of cargo which have most increased productivity (or decreased manhours) and have benefited the most because of increased productivy and reduced manhours.

Insofar as automobiles are concerned, however, their rate of productivity combined with their peculiar shape creates a problem where assessment on a tonnage basis is concerned. As the Court recognized in *Transamerican*, "either of the traditional methods of measuring that cargo, weight or cubic measurement, [is] inappropriate." (at 623.) If automobiles were assessed on a measurement basis, without regard to productivity, they would pay about eight times what they would pay on a weight basis (their ratio of measurement to weight being about 8 to 1—see page 7, *supra*) and eight times what cargo assessed on a weight basis would pay. This obviously would be unfair. Similariy, however, at least in the context of this proceeding, an assessment on a weight basis would also be unfair. In order to obtain an accurate basis for comparison of the rates of assessment for different categories of cargo, or even to determine the effective rate of assessment for any particular category of cargo, we must determine, not only the relative cost per ton under the assessment agreement, but the relative cost per hour.

An example may serve to clarify the matter under consideration. If a very productive cargo compared to some other type of cargo (say eight times as productive) is assessed at a much smaller rate (say one-eighth the rate on the other type of cargo) both types of cargo will pay the same effective rate. The per hour assessment as a basis of comparison is the one we utilized in considering assessments in the New York assessment agreement case affirmed in *Transamerican*. See *Agreement No. T-2336—New York Shipping Association*, 15 F.M.C., *supra*, especially at pages 277–279.

The following tables show the relative productivity, comparative levels of assessments under the assessment formula agreement, and the effective rates under the agreement for automobiles and the other categories of cargo, both in actual costs and in ratios:

TABLE I
Productivity

Cargo Category	*Tons Per Manhour*
Breakbulk	1.16
Lumber	2.07
Automobiles	8.60
Containers	3.52
Bulk	20.92

TABLE II
Assessments Under Pay Guarantee Formula

Cargo Category	*Ratio (with breakbulk as base)*	*Per Ton (as of August 4, 1973)*
Breakbulk	1	.16
Lumber	1	.16

Automobiles	.20	.032
Containers	.70	.112
Bulk	.143	.023

TABLE III

Cost Per Hour (Effective Assessment Rate)

Cargo Category	
Breakbulk	.1856
Lumber	.3312
Automobiles	.2752
Containers	.39424
Bulk	.48116

TABLE IV

Cost Per Hour (Effective Assessment Rate Ratios—Approximate)

Breakbulk	1
Lumber	1 3/4
Automobiles	1 1/2
Containers	2 1/6
Bulk	2 1/2

On the basis of the foregoing, it would appear that automobiles pay about half again as much as breakbulk cargo under the assessment formula agreement. As Wobtrans acknowledges (see Wobtrans' Exceptions to the Initial Decision, page 32), the comparison most relevant in determining the reasonableness of the assessment on automobiles is its relationship to the assessment on breakbulk cargo, which pays the lowest per hour cost, has benefited least from mechanization (since it does not utilize Ro/Ro carriage, containerization, or other specialized mechanized handling methods), and thus is least responsible for manhour loss due to mechanization.

It is fair to say that the record in this proceeding supports an effective assessment on automobiles of approximately half again that placed on breakbulk cargo. Wobtrans is, of course, correct that determinations with respect to the lawfulness of assessment formulas should be made from a particular "base time" to protect against attributing increases in productivity to factors not relevant to the proper time frame. We find the proper "base time" to be 1969, both because it is the base generally used by the parties for computations with respect to the reasonableness of assessments, and because it marks the time of the last examination and approval by the Commission of PMA's assessments for work-loss due to mechanization. (See Commission order dated January 17, 1969 approving Agreement No.T-2210, and discussion at pages 11–12, *supra.*)

The record herein clearly shows, insofar as automobile carriage is concerned, both decreasing manhours and an increase in productivity due to mechanization. The record shows that there has been, for each category of cargo, including automobiles, all during the 1969–1972 period a decrease in manhours used per ton loaded or discharged without an offsetting increase of total tons loaded. This decrease in

manhours per ton, moreover, is related to the elimination of restrictive work practices and the introduction of new cargo loading equipment and methods which have been permitted because of the pay guarantee fund which is designed to compensate for decreasing manhours caused by the new work practices and cargo handling methods and equipment.

Insofar as automobile carriage is concerned, the major factor contributing to decrease in manhours per ton has been the greatly expanded and expanding use of Ro/Ro vessels. This cargo loading and unloading innovation, whereby automobiles are driven off and on vessels rather than being lifted on and off, results in a reduction of manhours per ton of somewhere between 200 and 300 per cent. Wobtrans in fact does not contest that its Ro/Ro operations are more productive than its conventional lift-on/lift-off (Lo/Lo) operations, that the use of Ro/Ro in place of Lo/Lo has increased productivity, and that this increased productivity through the use of Ro/Ro vessels has diminished longshore employment. (See Wobtrans' Exceptions to Initial Decision, page 38.)

The amount of reduction in manhours caused by the use of Ro/Ro vessels can, moreover, be quantified. During the period under consideration, i.e., the years 1970 and 1972 (omitting 1971 because of its problematical nature) Wobtrans' use of Ro/Ro rather than Lo/Lo vessels alone accounted for the loss of over 18,000 manhours (see page 22, *supra*).[16]

The Ro/Ro movement and its corresponding loss of manhours is, furthermore, all the more significant when one bears in mind (1) that Wobtrans has in the past few years (1969–1972) accounted for a relatively small and diminishing percentage of the Pacific Coast automobile movement, while the movement of automobiles from Japan, which constitutes the bulk of the movement, has shown a steady increase from its inception about ten years ago, and (2) that the carriage of Japanese automobiles is now predominantly a Ro/Ro operation. To the extent that a Japanese automobile carrier, rather than Wobtrans, carried the trade automobiles, even more manhours were lost, and such losses were far from compensated for by additional automobile tonnage, since automobile tonnage showed little increase in the 1969–1972 period. (See page 14, *supra*.)

When Wobtrans' operations alone are considered, it is clear that, during the period in question, a definite trend appears toward increasing use of Ro/Ro carriage. In 1969 only 2,466 (1.75%) of Wobtrans' vehicles were transported by Ro/Ro. By 1970, this had increased to

[16]Even if Ro/Ro operations were considered closer to 2 than 2.56 times as productive as Lo/Lo operations, Wobtrans' operations alone would have accounted for the loss of more than 12,000 manhours.

11,037 (8.55%), by 1971, to 11,247 (9.47%), and by 1972, 20,147 (22.96%). Ro/Ro movements increased between four and five times over the 1969 level in 1970, and virtually doubled the 1970 level in 1972 [17] to the point where Ro/Ro constitutes nearly 25% of all of Wobtrans' automobile carriage, a point which it reached in four years.[18] Even if Wobtrans maintains the 1972 ratio of Ro/Ro to Lo/Lo vessels (an unlikely occurrence since Wobtrans expected an increase in both tonnage and manhours in 1973 (see page 21, *supra*), which would appear to require greatly expanded Ro/Ro operations), it will, because of increased Ro/Ro productivity over Lo/Lo levels, already be benefiting at about one and one half times as much as breakbulk cargo.[19] Moreover, if Wobtrans remains at its 1972 rate of growth and merely doubles its amount of Ro/Ro carriage in each succeeding year in the near future (a more likely prospect considering Wobtrans' intention to increase tonnage and manhours), it will be benefiting at least twice and perhaps as much as three times as much as breakbulk cargo. Under the circumstances, and bearing in mind that "charges need only be 'reasonably' related and not perfectly or exactly related," [20] and that "precise calculations are elusive, and absolute equity is beyond concrete demonstration," [21] the effective assessment under the pay guarantee assessment formula of 1 1/2 times that on breakbulk cargo can hardly be said to be unreasonable.

When Wobtrans' operations are seen in perspective, i.e., as representing a very small share of automobile carriage, the vast majority of which has utilized Ro/Ro to a much greater degree, and, because of its continuing expansion, is continuing to do so, the 1 1/2 times breakbulk level of the automobile assessment seems even more "reasonable" in terms of relating "burdens" and "benefits."

The record suggests no more "feasible" (in Mr. Justice Harlan's language) method of assessing automobiles in terms of benefits and burdens. As noted above, a formula based on manhours, in whole or in part, creates the problem of assessing least those who should be assessed most. A formula based on tonnages without considering productivities would also be faulty because it would fail to consider the effective rate of assessment paid, i.e., the cost per hour. If, as Wobtrans suggests, we assessed it at a weight ton rate, it would pay the same effective rate as general cargo because of the relationship shown on

[17] We ignore 1971 as unreliable, but, as can be seen, there is a doubling of vehicles carried by Ro/Ro in 1972 over 1971 as well.

[18] As noted at page 15, *supra*, Wobtrans had no Ro/Ro Pacific Coast carriage in 1968.

[19] If Ro/Ro productivity is taken as roughly 2.15 times that of Lo/Lo (the lowest figure advanced by Wobtrans), Wobtrans' shift of 25% of its operation to Ro/Ro has already benefited it to the degree of 1.29 times that of breakbulk. If a 2.5 figure is used for the Ro/Ro Lo/Lo productivity ratio, the benefit ratio of Wobtrans vis-a-vis breakbulk is 1.375.

[20] *Volkswagen* at 295 (concurring opinion of Mr. Justice Harlan).

[21] *Transamerican* at 620.

this record between the ratio of Wobtrans' automobiles' measurement to weight and the ratio between Wobtrans' automobiles' productivity as compared to breakbulk productivity. The record shows that, by coincidence, both ratios are about eight to one. Thus the productivity rate of eight multiplied by the assessment rate of 1/8 the breakbulk rate would give automobiles the same effective (cost per hour) rate as breakbulk cargo.

Wobtrans' contention that it is unfair to assess automobile cargo as a whole more than breakbulk cargo because of the increased productivity and reduced manhours for which Ro/Ro is responsible is not convincing. First of all, as Wobtrans concedes (Exceptions of Wobtrans, page 61), the relevant category for cargo assessment comparisons and evaluations is automobiles, not Volkswagens. Just as Wobtrans asserts that it should not be punished for loss in manhours due to factors unrelated to the objectives of the guarantee fund (i.e., increased competition from Japanese automobiles),[22] so it must realize that when automobiles are considered as a whole Ro/Ro is the dominant form of carriage in the Pacific Coast trade here under consideration.

Secondly, it is the category of automobiles which specifically benefits from the shift to and increasing use of Ro/Ro vessels, and therefore it is automobiles which should be required to bear the burden of such benefits. Thus, in *Agreement No. T-2336 - New York Shipping Association*, affirmed in *Transamerican*, we considered automobiles as a single category, recognizing that it involved both Ro/Ro and Lo/Lo carriage. (See 15 F.M.C., *supra*, at 277–279; 304–305; 14 F.M.C. 107; 115; 138–139.)

Furthermore, consideration of Ro/Ro carriage as a separate category is completely unwarranted in the context of this proceeding and on the present record. Since the proceeding is designed to determine only the proper assessment for automobiles, conclusions with respect to assessments for Ro/Ro carriage in general could well be said to be outside the scope of this proceeding. Even if they were not, however, the record herein will support no conclusions with respect to Ro/Ro carriage in general. There is no evidentiary basis for finding the productivity ratio for Ro/Ro vis-a-vis conventional carriage for cargo other than automobiles, no showing of the extent to which Ro/Ro carriage was used for cargo other than automobiles before the "base time" and no indication of the degree to which cargo other than

[22]We have not, as will be seen from our computations on page 29, *supra*, considered loss of manhours due to increased competition in determining the reasonableness of the assessment formula. We believe that the reasonableness of assessment formulas can be determined without reference to the economic situations of persons in particular assessment categories. Cf., *Agreement No. T-2336 - New York Shipping Association*, 15 F.M.C., *supra*, at 277.

automobiles is suitable to Ro/Ro carriage. Finally, if indeed other cargo is suitable to and has been transported by Ro/Ro carriage, it seems most likely that such cargo would have been containerized for ease and economy of movement and that, for such cargo, containers were "rolled on and off." In that case, such cargo would have been assessed as "containerized cargo," a category for which a special assessment rate already exists.[23]

The two remaining contentions of Wobtrans in opposition to the assessment on automobiles are that the assessment is improper because its present level of productivity is not "new productivity" and that it should not be made to pay for decreasing manhours when automobile manhours are increasing.

It cannot seriously be contended that Ro/Ro productivity is not new productivity. In 1961, the date of the start of the first M&M fund, there were no Ro/Ro vessels in the Pacific Coast trade, and, as the Supreme Court observed in *Volkswagen,* "the unloading of automobiles was already so highly mechanized that there was little likelihood of improvement" (at 266). In 1966, when the second M&M fund began, very few of Wobtrans' vehicles were transported by Ro/Ro, and the record does not show that any other vehicles were transported by Ro/Ro at that time. By 1968, even the minimal Ro/Ro carriage of Wobtrans had ceased. Thus the two to three times increase in productivity of Ro/Ro over Lo/Lo carriage must indeed be treated as "new productivity." Furthermore, Wobtrans' argument that increase in productivity because of Ro/Ro carriage has been offset by a decrease in productivity in Lo/Lo carriage [24] fails to consider that but for the use of Ro/Ro carriage Wobtrans would have experienced two to three times less productivity for each Lo/Lo vessel used than it experienced on each Ro/Ro vessel actually used.

As we have noted above, Wobtrans is not being penalized because of its decreasing manhours due to competition from Japanese automobiles, a factor which has not been considered in determining the reasonableness of the automobile assessment. Moreover, Wobtrans benefits from our treatment of automobiles as a whole since manhours spent on automobile carriage as a whole are increasing, unlike those of Wobtrans which, as noted at page 22, *supra,* have shown a steady and expanding decrease. On the other hand, although manhours are increasing somewhat for automobile carriage as a whole, they are increasing at a very much slower rate than would be the case if only

[23]The record shows, interestingly, that if automobiles are containerized they too would be assessed at the assessment rate for containerized cargo.

[24]Combined (Ro/Ro and Lo/Lo) productivity for Wobtrans was about 1.3 vehicles per manhour during the 1969–1972 period.

Lo/Lo carriage were used for automobiles. The slight increase in automobile tonnage for the 1969–1972 period would account for two to three times more than the present manhours if only Lo/Lo carriage were involved. The reduction in manhours through the utilization of Ro/Ro carriage is a benefit to automobiles, a benefit directly related to its responsibility for lost manhours, and a benefit for which it should pay. The pay guarantee plan, unlike the assessment plan involved in the NYSA-ILA proceeding, does not involve the concept of compensation for "shortfall," i.e., the payment for falling below a certain number of manhours, a concept which does not apply when manhours are expanding. Automobiles would not be liable for a "shortfall" type of assessment. On the other hand, as we determined in the NYSA assessment matter, with affirmance by the Court of Appeals, assessment for a pay guarantee plan for guaranteed income per longshoreman based on a certain number of hours worked is not dependent upon finding responsibility for, or even the existence of, decreasing manhours. A pay guarantee, rather, is an obligation to be borne by the entire trade and by each section of the trade in relation to its fair share of the costs of the pay guarantee fund. See *Agreement No. T-2336 - New York Shipping Association*, 15 F.M.C., *supra*, at 269–270; *Transatlantic*, 492 F.2d, *supra*, at 627–628. Certainly automobiles, which have been responsible for, and greatly benefited from the use of new and highly mechanized cargo carrying methods, and the decrease in manhours per ton which these methods create, should pay their fair share of the fund designed to compensate longshoremen for increasing productivy (i.e., a decrease in the manhours per ton ratio) caused by the use of mechanization. As our analysis of the automobile assessment shows, the formula for assessing automobiles is "fair" because it "reasonably relates benefits to burdens" and does so, moreover, in a way which is "as appropriate as is feasible." [25]

In turning now to the question of the lawfulness of the formula for automobile assessments under section 16 of the Act, we wish to make clear at the outset the nature and extent of the inquiry which is relevent under this statutory provision within the context of the present proceeding. In the present proceeding, unlike that involving

[25]Wobtrans' attack upon the manner in which PMA and Mr. Kagel derived the formula for automobile assessments is beside the point. Even if Mr. Kagel and PMA did not consider the proper matters in establishing the automobile assessment (and we think that the factual discussion, at pages 16–19, *supra*, shows that they did), the determination of the propriety of the formula is for the Commission, not PMA and/or Mr. Kagel. Moreover, the procedure by which the formula is established is irrelevant so far as its legality is concerned - it is the effect of the assessment that determines its legality. Just as the supposed good intentions of PMA in *Volkswagen* did not insulate it from attack, the alleged failure of PMA and Mr. Kagel to follow the proper standards in establishing the formula should not make it unlawful. Cf. *Volkswagen* at 281–282. Irrespective of the procedure by which the automobile assessment was established, we have examined the automobile assessment formula and have found it to be reasonable because of the fairness of its impact on automobile carriage.

the assessments of the NYSA, we are not concerned with the reasonableness of the assessments for any category of cargo other than automobiles. Our concern with the assessments on other categories of cargo is limited to an analysis of whether they are such as to subject automobiles to "undue or unreasonable prejudice or disadvantage."

We have received little guidance as to how determinations concerning assessments are to be made under section 16. The only court statement on the matter is Mr. Justice Harlan's dictum in his concurrence in *Volkswagen,* reiterated by the Court of Appeals in *Transamerican,* that the Commission should inquire "whether special treatment for . . . [a] class of goods was necessary under the circumstances and, if so, whether the special rule adopted was the fairest that could be devised. (See page 24, *supra.*)

It could be contended that since we have already concluded that special treatment was necessarily accorded automobiles, and that the special formula for assessing them related benefits to burdens in a manner "as appropriate as is feasible," we have already made sufficient "inquiry" as to whether the formula for assessing automobiles is "the fairest that could be devised," particularly when it is remembered that "precise calculations are elusive, and absolute equity is beyond concrete demonstration." (*Transamerican,* at 620.) Strength is lent to such position by the Supreme Court's observation in *Volkswagen* that, since "only the assessment on automobiles is . . . challenged, . . . there is no reason to suppose that the Commission will not consider expeditious approval of so much of the agreement as is not in dispute." (at 278). Such "expeditious approval" would seem to suggest that the lawfulness of cargo assessments on particular categories of cargo can be determined without reference to assessments on other categories of cargo.

It could, on the other hand, however, be argued that questions of prejudice and discrimination by their very nature require an examination of the treatment accorded different categories of cargoes.

We find it unnecessary to decide between the two views as to the application of section 16 because, even if the latter view is correct, the record herein does not show that automobiles are in any way unlawfully prejudiced or disadvantaged by the automobile assessment vis-a-vis the assessments on other categories of cargo. In fact comparisons of the treatment of other categories of cargo demonstrate that automobiles are treated at least as advantageously under the assessment formula as other classes of cargo.

As shown by Table IV at page 28, *supra,* taking the assessment on breakbulk cargo as the basic level, the effective rates of assessment on different categories of cargo reveal ratios to the breakbulk level in the following amounts: lumber—1 3/4; automobiles—1 1/2; containers—

2 1/6; bulk—2 1/2. Thus, every category of cargo for which a special rate of assessment has been established pays more than automobiles. This hardly seems unfair to automobiles. Examination of the record, moreover, supports the fairness of the assessments on automobiles vis-a-vis those on other categories of cargo.

Lumber, for example, although it pays more than automobiles, has experienced a lesser increase in tonnage during the 1969–1972 period than automobiles,[26] and its productivity rate, which is much lower than that of automobiles (2.07 tons per manhour vis-a-vis breakbulk's 1.16 tons per manhour, as compared to automobiles' 8.60) has, evidence of record indicates, increased less significantly than either containers' or automobiles' and, consequently, reduced manhours less.

Containerized movements, on the other hand, have greatly increased in volume. In 1969 container cargo represented 1/4 of all general cargo entering or leaving the Pacific Coast ports other than logs and lumber and automobiles. Between 1969–1972 container traffic doubled (from about 6 million to about 12 million tons) and breakbulk traffic correspondingly decreased (from about 19 million to about 12.5 million tons). Containerized cargo, therefore, should be expected to be assessed at a significantly higher effective rate than automobiles, and it is 2 1/6 times breakbulk rather than 1 1/2 times breakbulk. Although, as we stress, the question of the reasonableness of the assessment on categories of cargo other than automobiles is beyond the scope of this proceeding, we can and do find that automobiles are not unfairly treated because containerized cargo is not assessed at a still higher effective rate. If in fact, as appears to be the case, containerized movements use one third the manhours of breakbulk movements, while automobiles through the utilization of Ro/Ro transportation are able to decrease manhours somewhere between two and three times, the 2 1/6 as compared to the 1 1/2 ratios for these types of carriage seem quite appropriate. Furthermore, when one considers that evidence of record indicates that containerized transportation is unlikely to grow at as great a rate as Ro/Ro automobile transportation in the near future, the ratio seems even more reasonable,[27] and the

[26]Compare the following with the comparable figures for automobile tonnage on page 14, *supra*.

[27]Record projections based on Maritime Administration studies for the Pacific Coast indicate that container tonnage will retain its present share of tonnage over the next few years (1973–1980), growing at a rate slightly lower than the rate for all tonnage during the early part of the period. (1973–1975.) On the other hand, testimony of record shows that now the major shift is to the use of Ro/Ro vessels.

relatively low automobile assessment rate vis-a-vis the container rate should enable Ro/Ro automobile carriers to recoup some of their investment in new equipment.

The last category, bulk cargo, pays considerably more than automobiles, as would be expected because of very great productivity (20.92 tons per manhour as compared to automobiles' 8.60 tons per manhour). Nor does it appear that automobiles are unfairly treated because the effective rate on bulk cargo is not still higher. Although bulk cargo is very productive, the evidence of record indicates that its productivity in not "new." Bulk operations were already highly mechanized in 1961 and expected to gain little from further mechanization. The same appeared true in 1968. Such mechanization as helped bulk appreciably came as "early innovations." Tonnage for bulk cargoes over the 1969–1972 period has remained remarkably stable.[28] So has manhour production. Future projections indicate, moreover, that the percentage of bulk tonnage vis-a-vis all tonnage will remain relatively constant, growing slightly faster than the average in 1973–1975, and slightly slower than the average in 1976–1980.

Finally the record reveals that productivity has increased on automobiles carried even on Lo/Lo vessels because of the use of better equipment, and that commodities other than automobiles not in a special category and assessed to their disadvantage on a measurement basis rather than a weight basis [29] would pay a tonnage rate five times higher than automobiles. While such statistic is not particularly meaningful absent productivity figures for the other commodities, it certainly is not prejudicial to Wobtrans' interests.

No cargo category other than automobiles has challenged the pay guarantee assessment allocations, and Wobtrans is the only automobile interest which has challenged the formula. This proceeding is limited to the question of the propriety of the assessment on automobiles. Within such context, we feel that the record is sufficient to allow for such cargo comparisons as may be necessary, and that such comparisons favor, rather than prejudice or disadvantage, automobiles.

Our decision herein is in no way inconsistent with our actions in any other assessment allocation proceeding following *Volkswagen*. In *Volkswagen* we were directed by the Supreme Court to determine

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[28] *Total Dry Bulk Tonnage*

1969	22,537,761
1970	25,660,018
1971	19,762,760
1972	23,435,590

[29] Such commodities do exist. See *Volkswagenwerk Aktiengesellschaft v. Marine Terminals*, 9 F.M.C. 77, 84 (1965).

the proper assessment for automobiles, which we did in Docket No. 68–18, where we approved an assessment allocation formula for automobiles like the one we approve here. Although, as Wobtrans contends (see page 11, *supra*), there may have been reasons for approving the formula not specifically related to the correlation of benefits to burdens, the result here can hardly be said to be inconsistent with a similar result in an earlier proceeding. Moreover, the problems which troubled the Court in *Volkswagen* have been explored in this proceeding. In *Volkswagen* the Court was concerned because the M&M fund assessment appeared to increase automobile costs ten times more than costs for other cargoes while automobiles appeared to be unlikely to benefit more than other classes of cargo from increased mechanization (at 265–266; 281). The record in the present proceeding, however, shows that: a) automobile costs have not increased but kept at the same level as under the former agreement (i.e., 20% measurement ton); b) automobiles are assessed at 1 1/2 times the general cargo rate, which is reasonable in the light of benefits received; and c) the benefits accruing to automobiles are the result of increased productivity resulting from new mechanized methods of handling automobiles which were neither in use nor foreseeable at the time of *Volkswagen*.

Similarly, our decision here squares with our actions with respect to the assessments made by the New York Shipping Association. In our decision with respect to the earliest NYSA assessment period we examined, we approved (with affirmance in *Transamerican*) an automobile assessment on a weight ton basis. Just as Wobtrans successfully contended, however, with respect to the assessment there in issue, that one could not mechanically apply the 20% measurement ton assessment measure used on the Pacific Coast without examination of the facts and circumstances pertaining at the Port of New York (15 F.M.C., *supra*, at 277), so here we cannot mechanically apply the weight ton measure. There is, moreover, good reason not to apply it. The weight ton measure was adopted in the NYSA proceeding because assessment at the 20% measurement level would have had the effect, taking the productivity of automobiles into consideration, of taxing Lo/Lo automobiles at an hourly rate of $6.68, over 2 1/2 times as much as the hourly rate of $2.61 for breakbulk cargo (15 F.M.C., *supra*, at 279) and Ro/Ro automobiles at $12.51 per hour. The 20% measurement level of assessments increased costs over seven times for Lo/Lo carriers and 13 times for Ro/Ro carriers (15 F.M.C., *supra*, at 277). Moreover, Ro/Ro carriage for automobiles, the source of increased productivity due to mechanization, played a very small part in the transportation of automobiles at the Port of New York. (Less than 10% for Wobtrans.

See 14 F.M.C. 94, 138 (1970).) In fact only about two percent of *all* tonnage at New York moved on Ro/Ro carriers (see 14 F.M.C. 94, 107). The record, moreover, did not envision the expanson of Ro/Ro automobile carriage at New York. In the instant case, however, the assessment does not involve an increase over earlier levels, and the record shows wide and expanding use of highly productive Ro/Ro vessels for automobile transportation. Nevertheless, in spite of these significant differences, the effective assessment rate for automobiles under the pay guarantee plan is, in fact, quite similar to that adopted in the NYSA case. In *NYSA* we approved an assessment formula for automobiles which taxed Lo/Lo automobiles at $3.81 per hour (Ro/Ro autos paid about twice this) as compared to $2.61 per hour for breakbulk cargo. The auto/breakbulk ratio in *NYSA* is thus not far different from that present here, i.e., $.2752 per hour average for *all* autos and $.1856 per hour for breakbulk cargo. The similarity is even greater when one realizes that some costs assessed under the formula in *NYSA* on a tonnage basis (e.g., pension benefits and welfare benefits) are paid under the agreement here under consideration on a manhour basis, which may be more beneficial to Wobtrans.[30]

We have since *Transamerican* considered two other agreements at New York involving assessments for automobiles, in one of which, covering 1971–1974, we approved automobile assessment on a 14% measurement ton basis, i.e., somewhat higher than a weight ton basis, and in the other of which, covering 1974–1977, we approved such assessment on a weight ton basis. Both of these agreements, like the 1969 M&M agreement, involved voluntary settlement by the shipping association and the automobile interests, and hence may not involve precisely the same considerations as are operative here. (See page 11, *supra.*) We mention our action with respect to these agreements, not to show its correctness or applicability to the instant proceeding, but only for the sake of completeness and to show that it is, so far as appears, not inconsistent with our action here.

One final issue must be considered. Prior to the hearing in this proceeding, the question arose as to whether our order instituting this proceeding covered consideration of the formula adopted for the funding of the pay guarantee plan under the 1973 collective bargaining agreement, which was entered into subsequent to institution of this investigation. The Administrative Law Judge ruled that it did and that no new funding agreement need be filed. He was correct. Ap-

[30]Even if the effective assessment in *NYSA* is compared with the effective rate on Wobtrans alone, which is somewhat higher than the effective rate on automobiles as a whole because of Wobtrans' greater productivity (see page 13, *supra*), a comparison which, as noted at page 32, *supra*, we consider improper, the results are still similar since both in *NYSA* and here Wobtrans pays about 1 1/2 times the breakbulk level for Lo/Lo carriage and twice the Lo/Lo level for Ro/Ro carriage.

proval of the interim assessment agreement under which PMA operated was extended until action on the final agreement. Agreement T-2635–2 itself provides that it applies to the ILWU-PMA pay guarantee plan "and extensions thereof." Thus there has never been a time when assessments have not been covered by an approved agreement, nor, since the formula for assessing automobiles has not changed,[31] is there any necessity for submitting a new agreement.

This does not mean, as Wobtrans seems to fear, that our approval here is approval of the funding formula for all time. We have continuing jurisdiction over the assessment formula agreement under section 15 of the Act and will examine the agreement afresh, on complaint or on our own motion, whenever it appears that changed circumstances may require such action, *City of Los Angeles v. Federal Maritime Commission,* 385 F.2d 678, 683 (D.C. Cir. 1967). Insofar as our examination here is concerned, however, the funding formula for the pay guarantee plan, Agreement No. T-2635–2, has not been shown to be contrary to sections 16 or 17 or otherwise violative of the Shipping Act, 1916. Therefore Agreement No. T-2635–2 is ordered approved pursuant to section 15, and this proceeding is discontinued.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[31]There is in fact a certification in the record here by PMA's Secretary that PMA has continued the funding formula of the interim agreement and Agreement No. T-2635–2 for funding of the pay guarantee plan under the 1973 collective bargaining agreement.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–17

AGREEMENT NO. 9955–1 - A/S BILLABONG; WESTFAL-LARSEN AND CO. A/S:
FRED. OLSEN AND CO.; AND STAR SHIPPING A/S

ADOPTION OF THE INITIAL DECISION

June 30 1975

BY THE COMMISSION: (James V. Day, *Vice Chairman;* Ashton C. Barrett and Clarence Morse, *Commissioners*) *

The proceeding was instituted to determine whether Agreement No. 9955–1 (Agreement) among A/S Billabong (Billabong); Westfal-Larsen and Co. A/S (Westfal); Fred. Olsen and Co. (Olsen); and Star Shipping A/S (Star) should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916. Agreement No. 9955–1 essentially provides a procedure by which Star acts as the vehicle through which the other parties conduct a joint service, charter vessels to Star, share profits or losses, and establish corporate management of Star in such a manner as will accomplish the purposes.

Sea-Land Service, Inc. (Sea-Land) and the Transpacific Freight Conference of Japan/Korea (TPFCJ/K) and its member lines, who protested the Agreement when it was published in the *Federal Register,* were named petitioners in the proceeding.

In his Initial Decision, Administrative Law Judge Norman D. Kline concluded that: (1) the Commission has section 15 jurisdiction over Agreement No. 9955–1 since the Agreement gives special advantages, regulates competition, and establishes a cooperative working arrangement; (2) Star's rate structure and rate making practices in the inbound transpacific trade have not been shown to be in violation of section 14 Fourth, 16 First, or any other provision of the Act; and (3) Star's services are to the benefit of shippers, ports, and other persons, and the Agreement should therefore be approved.

*Chairman Helen Delich Bentley did not participate.

This proceeding is before us on exceptions to the Initial Decision.

Upon careful consideration of the record in this proceeding, we conclude that the Presiding Officer's findings and conclusions set forth in his Initial Decision are, except as hereinafter noted, proper and well founded and we accordingly adopt them as our own. However, without disturbing any of these findings and conclusions, there are certain matters raised on exception which, we believe, warrant discussion. Exceptions not specifically discussed have nevertheless been reviewed and found to either constitute reargument of contentions already properly disposed of by Judge Kline or to be otherwise without merit.

Star Shipping excepts to Judge Kline's finding of section 15 jurisdiction over Agreement No. 9955–1. Star asserts that Agreement No. 9955–1 is an agreement of "corporate ownership" and therefore it is in error as a matter of law for the Administrative Law Judge to conclude that the Commission has jurisdiction over the Agreement. We believe that Star's assertion of the lack of section 15 subject matter jurisdiction in the circumstances presented by consideration of Agreement No. 9955–1 is not well founded.

It is clear from the legislative history of the Shipping Act, 1916, that Congress considered that termination of the anticompetitive conference agreements would result in either cutthroat competition with only the strongest shipping companies surviving, or consolidation by acquisition and common ownership. House Committee on the Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H.R. Doc. No. 805, 63 Cong., 2d Sess. (1914). Faced with this alternative:

> . . . the committee chose to permit continuation of the conference system, but to curb its abuses by requiring government approval of conference agreements. It did so because it appears that if conferences were abolished, the result would be a net decrease in competition through the mergers and acquisition of assets agreements that would result from unregulated rate wars. *F.M.C. v. Seatrain Lines, Inc.* 411 U.S. 726, 738 (1973).

The functions of the Federal Maritime Commission are therefore limited to regulation of anticompetitive activities carried on between viable carriers by agreement for cooperative working arrangements. Mergers and acquisitions were not to be encouraged but rather were to be fully susceptible to scrutiny under the antitrust laws. On the other hand, the viability of individual lines was to be encouraged by approval of cooperative working arrangements between such lines.

Of course the distinction between the merger/acquisition and the cooperative working arrangement is not always readily discernible. For the purpose of determining the boundaries of the Commission's

jurisdiction, it is not enough to merely attach a label of merger or cooperative working arrangement to the transaction under scrutiny, but rather the Commission must look to the end result of the Agreement. If the end result of the Agreement is that the life of a viable carrier is extinguished by its absorption into the corporate structure of another carrier, then the Commission may have no jurisdiction over an agreement because there is no ongoing arrangement to regulate. In a true and absolute merger, once the deed is done there is no way for the Commission to undo it. It is beyond the power of the Commission to resuscitate an expired company and unscramble the assets under its power to disapprove agreements previously approved, *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 735 (1973). If, however, the carriers remain independently viable even though their agreement contains or has overtones of merger and/or acquisition and the Agreement creates ongoing rights and responsibilities between the parties, then there is a relationship which may be regulated and, by mandate of Congress, must be regulated.

The Agreement here in question sets forth the terms of the joint venture between Billabong, Olsen, Westfal, and Star, to establish and operate a worldwide shipping company. It provides that Star shall time charter vessels from Billabong, Olsen and Westfal-Larsen and specifies the proportional total tonnage of charters by Westfal-Larsen, Billabong and Olsen to Star. The value of the charters, the method of computation of the charter hire and the payment for charter hire is the same for all the parties to the Agreement. Thus a ship chartered to Star by Billabong will be owned by Billabong, will be manned by a Billabong crew which will be paid by Billabong, and Billabong will be compensated for the operation of its ship not by a flat charter fee but by a portion of the profit derived from the operation of that charter ship. The Agreement also specifies that in the event that the joint service established by Agreement No. 9955–1 joins any conference, each of the members (Westfal-Larsen, Billabong, Olsen and Star) shall be entitled to the same privileges as are permitted to members of other joint services who are conference members.

While the arrangement effected by Agreement No. 9955–1 has some attributes of a merger/ownership agreement in the establishment of a separate corporate Star, it transcends a mere merger and effectuates a cooperative ongoing arrangement in the foreign commerce of the United States wherein all four carriers are actively participating. Furthermore, since the parties to the Agreement are still viable, the parties may take back their charters and continue their operations as prior to section 15 approval if the Agreement should be disapproved by the Commission. Billabong, Olsen, Westfal-Larsen and

Star have not been merged into one, are independently viable and, in cooperation, are actively participating in the foreign commerce of the United States through an agreement which creates ongoing rights and responsibilities over which the Commission has jurisdiction.[1]

"Sea-Land and TPFCJ/K, and to a more limited extent, Hearing Counsel attacked the rates of Star as being violative of sections 14, 16, 17, or 18 of the Shipping Act, 1916. Sea-Land and TPFCJ/K assert, therefore, that the agreement is not approvable under section 15 of the Act." It should be noted that in a complaint case wherein a specific violation of the Act is alleged, the complainant has the burden of showing the violation. By alleging a specific violation of the Act in the case involving the approvability of an agreement under section 15, the burden cannot be artificially switched. Even though the parties to an agreement may have the burden of showing benefits to be derived by approval of the agreement, the parties to an agreement cannot be saddled with the burden of proving a negative (i.e., there is no violation of the Act) merely because an allegation of a violation of a specific section of the Act is alleged. We concur with the decision of the Administrative Law Judge that in this proceeding there was not a showing that either Star's FAK rates or volume discount rates were in violation of any section of the Shipping Act, 1916.

With regard to Star's FAK rates the record shows that a high percentage of Star's carryings are in electronic goods and that Star did not carry the wide variety of items carried by Sea-Land such a motor cycles, auto parts, and porcelain ware (which are lower rated commodities). TPFJK/K, Sea-Land, and Hearing Counsel all contend that this showing is sufficient to conclude that Star's FAK rates are in fact discriminatory against low value, low rated commodites and discriminate in favor of high value, high rated commodities. The Administrative Law Judge, on the other hand, found that there was insufficient direct causal connection between the nonmovement of low rated, low value commodities and Star's FAK rates which were lower than specific commodity rates of the complaining carriers for the cargoes at issue. The Administrative Law Judge simply concluded, and we concur, that there were many other possible reasons why the lower rated commodities were not moving on Star. While not passing on FAK rates generally we do find that Star's FAK rates have not been shown to give any undue or unreasonable preference or advantage to any particular person in violation of sections 16 First, establish any rate, fare or charge which is unjustly discriminatory between shippers in violation of section 17, or establish a rate which is so unreasonably high or low

[1]It is not necessary for the Commission to address Star's objection to the admissibility of its rates and practices in this proceeding since Star has not been adversely affected by consideration of these issues.

as to be detrimental to the commerce of the United States in violation of section 18(b)(5).[2]

With regard to volume discounts, the Commission agrees with the Administrative Law Judge that Star's volume discount rates were not *per se* unreasonable and that there was not a showing of a violation of section 14 Fourth or 16 First of the Shipping Act, 1916.

Sea-Land and TPFCJ/K also except to the Administrative Law Judge's finding that Star's practices, in implementing Agreement No. 9955–1, are neither detrimental to the commerce of the United States nor contrary to the public interest and therefore the Agreement should be approved. Sea-Land excepts to the Initial Decision in that it failed to adopt certain of its proposed findings of fact which Sea-Land submits would support a contrary finding by the Commission. The findings proposed by Sea-Land are almost exclusively limited to the inbound trade from Japan and Korea. Even if we were to agree that the proposed facts of Sea-Land were supported in the record, which we, on the whole, do not,[3] we would nevertheless feel constrained to approve Agreement No. 9955–1 because of the important public benefits shown by Star to flow to the shipping commerce of the United States which more than overcome the alleged detrimental effects on the inbound trade between Japan and Korea.

TPFCJ/K takes the position that Star had a burden of not only showing that there were serious transportation needs or important public benefits which could be derived from Star's overall service, but also that Star had the burden of showing that there were serious transportation needs or that there were important public benefits to be derived specifically from Star's inbound trade from Japan and Korea.[4] We do not agree. The Commission will not require a showing of transportation necessity to be made for every trade area covered

[2]TPFCJ/K excepts to Judge Kline's eight point analysis of the facts offsetting the allegations of discrimination as being in error. Quite to the contrary, we find Judge Kline's analysis to correctly underscore the failure of logical connection between the allegation of discrimination and the showing of discrimination.

[3]For example Sea-Land's assertions that Star has made a zero investment in the trade, that Star's service to shippers is highly selective, that there is a disparity in inbound and outbound shipper services, and that Star's rates are unknowable are simply not supported by record. That Star might in a given circumstance, set rates to meet out of pocket expenses is irrelevant since Judge Kline found that Star's rates met fully distributed costs in the inbound trade in 1973. Consideration of Sea-Land's breakeven point is totally irrelevant to the determination of the approvability of this Agreement. The fact that Star was the initiator of FAK and multi-container rates is also not relevant because, as has been discussed earlier, it has not been shown that Star's FAK or multi-container rates are violative of the Act.

[4]TPFCJ/K also made allegations of factual errors which for the most part are unsupported by the record, irrelevant, or immaterial to the ultimate conclusions. Most of these objections have been addressed in the body of this opinion or are similar to the allegations of Sea-Land addressed in the previous footnote and we see no need to discuss most of them further. Contrary to the exceptions of TPFCJ/K the Administrative Law Judge did find the trade to be overtonnaged and correctly omitted the adjective "extensively" in describing the overtonnaging since the extent was not clear from the record. Judge Kline was correct in excluding proffered exhibit 70, page 2 as *unreliable* hearsay in that he could not have given any weight to it if it had been admitted. In any case, if the figures contained therein had been considered, they would not have changed the outcome of this proceeding.

by an agreement. The whole agreement is to be considered; all the benefits and all the detriments.

Sea-Land and TPFCJ/K both put forward suggested conditions to, or modifications of, Agreement No. 9955–1 in the event that it is determined that the Agreement should be approved. They assert that the Administrative Law Judge erred in dismissing the conditions without analyzing each of them or adopting them in his Initial Decision. We have analyzed each of the proposed amendments or modifications and find that the Administrative Law Judge was correct in not adopting any of the amendments or modifications to the Agreement and in not analyzing each and every one of them. The proposed amendments or modifications were to correct alleged violations of the Shipping Act. Upon the failure of showing that Star's practices and Agreement were in violation of the Act, the proposed modifications or amendments were properly dismissed.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–17

AGREEMENT NO. 9955–1—A/S BILLABONG; WESTFAL-LARSEN AND CO. A/S;
FRED. OLSEN AND CO.; AND STAR SHIPPING A/S

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether Agreement No. 9955–1 is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest, or is in violation of the Shipping Act, 1916, and, therefore, whether it should be approved, disapproved or modified, and the Commission having this date made and entered its Adoption of Initial Decision, which is made a part hereof by reference, stating its findings and conclusions:

Therefore, It Is Ordered, That Agreement No. 9955–1 be, and hereby is, approved pursuant to section 15 of the Shipping Act, 1916.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74–17

AGREEMENT NO. 9955–1—A/S BILLABONG; WESTFAL-LARSEN & CO. A/S; FRED. OLSEN & CO.; AND STAR SHIPPING A/S

Agreement establishing a joint service/chartering enterprise found subject to section 15 of the Shipping Act, 1916, since it gives special advantages, regulates competition, and establishes a cooperative working arrangement, overseas situs of the parties notwithstanding.

Evidence relating to ratemaking practices of respondent Star is properly to be considered in determining the approvability of the agreement even if the agreement is not essentially one of rate-fixing.

Star's rate structure and ratemaking practices in the inbound transpacific trade not shown to be in violation of section 14 Fourth, 16 First, or any other provision of the Act. In fact, Star's services found to have benefited shippers, ports, and other persons. Agreement, therefore, approved.

A carrier who competes with lower rates and alternative methods of pricing, such as FAK, is not shown to be a predator or unduly prejudicing shippers, especially if his rates are compensatory, justified by transportation conditions, shipper testimony or complaints are absent, and there is no evidence that the carrier has or will deny shipper requests for reasonable rates. Such competition, especially in inflationary times, is not contrary to the public interest or detrimental to commerce.

R. Frederic Fisher, Edward M. Keech, and *Harold E. Mesirow* for respondents.

Charles F. Warren, George A. Quadrino, and *John H. Caldwell* for petitioner Trans-Pacific Freight Conference of Japan/Korea.

Edward M. Shea, John Mason, John A. Douglas, and *C. Michael Tarone* for petitioner Sea-Land Service, Inc.

Donald J. Brunner, C. Douglass Miller, and *Stephen T. Rudman,* Hearing Counsel.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was initiated by the Commission on May 7, 1974, in order to determine whether an agreement among four parties, namely, Westfal-Larsen & Co. (W-L), A/S Billabong (Billabong), Fred. Olsen & Co. (Olsen) and Star Shipping A/S (Star) merits approval pursuant to section 15 of the Shipping Act, 1916 (the Act).

The subject agreement, No. 9955–1, is actually an agreement to extend the life of an earlier agreement, No. 9955, which essentially provides for a procedure by which Star acts as the vehicle through which the other parties conduct a joint service, charter vessels to Star, share profits or losses, and establish corporate management of Star in such a manner as will accomplish these purposes. The parties to the agreement, named as respondents in this proceeding, seek extension of approval indefinitely with two minor modifications relating to a name change and definition of expenses.[2] The previous agreement, which had been approved by the Commission on November 12, 1971, and through which Star has been operating, was due to expire on November 12, 1974. Its life was extended by the Commission, however, until January 12, 1975, in order to provide the parties, Presiding Judge, and the Commission adequate time to carry out their respective functions leading to a sound and proper decision in this case.[3]

The filing of Agreement No. 9955–1 provoked two protests, filed by the Trans-Pacific Freight Conference of Japan/Korea (TPFCJ/K) and Sea-Land Service, Inc. (Sea-Land), named "petitioners" by the Commission's Order of Investigation. Essentially petitioner Sea-Land based its protest on the assertion that Star has been publishing a certain type of rate structure (FAK) coupled with volume discounts which, according to Sea-Land, is or may be unreasonably low, discriminatory among shippers and precludes movement of certain commodities, as well as establishing disparate rates, all allegedly in violation of various sections of the Act. Petitioner TPFCJ/K questioned the need for continued approval of the Star agreement and to some extent duplicates Sea-Land's assertions regarding the effect of Star's FAK volume-discount rate structure on movement of certain commodities and regarding the level of the rates.

The Commission's Order acknowledges the protests as well as the reply to them filed by Star and concludes "that Agreement No. 9955–1

[1] This decision became the decision of the Commission June 30 1975

[2] These two modifications, which no party opposes, change the name "Star Bulk Shipping Company A/S" to "Star Shipping A/S" and define "expenses of Star" in a new Article 2a essentially as expenses defined by the Board of Directors in its discretion.

[3] See Extension of Approval of Agreement 9955, August 20, 1974.

should be made the subject of a formal investigation to determine whether it should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916." The Commission furthermore ordered the proceeding to be expedited so that the issues raised therein could be resolved prior to the termination date of the basic agreement (November 12, 1974, since extended, as noted, until January 12, 1975).

As will be discussed below, a basic problem with which all parties to the proceeding have had to contend is the fact that the Commission's Order does not frame the issues specifically raised by the protests despite the fact that Star's reply to the protests emphatically asserted that those issues related primarily to matters outside the scope of a section 15 investigation, *i.e.*, to rates, which, if anything, should be determined in separate proceedings. It was and remains unclear whether the Commission's mere acknowledgement of the protests and reply without further discussion of the issues raised therein meant to convey the Commission's desire to litigate these rate-related issues. The Presiding Judge took a broad view of the Order so that the fullest and most complete evidentiary record could be developed and accordingly allowed evidence fleshing out the contentions of the petitioners even if the relationship of the evidence to the agreement itself was at times tenuous. This was done to some extent in consideration of the fact that the subject agreement was due to expire on November 12, 1974, and that failure to allow the development of a full record on all issues arguably within the scope of the Commission's Order might have led to a subsequent remand from the Commission which in all probability would have carried the proceeding well beyond the November 12 date on which the agreement was due to expire. It was also done in consideration of the fact that the Commission's Order, although framing the issues in ultimate terms of disapproval, cancellation or modification of the subject agreement, does paraphrase the statutory language of section 15 which expressly invokes issues involving unjust discrimination or unfairness among carriers, shippers, etc., detriment to the commerce of the United States, public interest considerations, and other violations of the Act. Order, p. 3.[4] As Star points out, however, evidence relating to the so-called rate issues was allowed to enter the record on a *de bene* or provisional basis, conditioned on a showing that a causal relationship existed between the agreement itself and Star's ratemaking practices.

[4]The Order states: "that pursuant to Sections 15 and 22 of the Shipping Act, 1916, a proceeding is hereby instituted to determine whether Agreement No. 9955–1 is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest, or is in violation of the Shipping Act, 1916, and therefore, whether it should be approved, disapproved or modified. . . ."

Whether this causal connection has been shown will be discussed below. In any event, Star has maintained the position that the rate-related issues ought not to have been litigated in this type of investigation.

BASIC FACTUAL BACKGROUND

The following findings of fact provide a basic factual foundation on which the issues in this proceeding can be appreciated and evaluated. In the section below entitled "Discussion and Conclusions" additional findings of fact are made where necessary for determination of particular issues.

How Star Operates

1. Star, the subject of Agreement 9955–1, is a Norwegian corporation originally formed in 1959 and is a common carrier by water in the foreign commerce of the United States.

2. At the time of its formation, Star (then known as A/S Star Shipping) was wholly owned by Mr. Per Waaler, but in 1964, a new company, Star Bulk Shipping Company was registered with Per Waaler and W-L as owners.

3. In June 1968, W-L transferred its interest to Westfal-Larsen Bulk Shipping Company A/S.

4. In February 1969, Star Bulk was formed into a limited company and its name was changed to Star Bulk Shipping Company A/S.

5. In June 1970, Per Waaler transferred his interest to Billabong.

6. At the effective date of Agreement 9955, November 12, 1971, Star Bulk Shipping Company A/S changed its name to Star Shipping A/S. On that date, Star had the following shareholders: W-L, Olsen and Billabong.

7. Billabong owns 40 percent of the outstanding shares of Star, and Olsen and W-L 30 percent each.

8. W-L is a Norwegian corporation and is a common carrier in the foreign commerce of the United States in the trade between ports on the U. S. West Coast and ports in South America. W-L is owner of five open-hatch vessels under charter to Star. W-L has at no time engaged in either container, forestry products, or other dry cargo carriage in the transpacific trades. It is not competitive with any of Star's operations, and at no time has W-L had plans or intentions, contingent or otherwise, to engage independently in transpacific trade or in Star's type of bulk parcel or forestry products movement in bulk type vessels.

9. Olsen is a Norwegian corporation and until 1970 was a common

carrier in the foreign commerce of the United States. At no time in the past or present, has Olsen competed with or duplicated Star's operations. At no time had Olsen carried forestry products or any other products in the U. S. West Coast/Japan-Korea trade and it has no plans, contingent or otherwise, to do so.

10. Billabong is a Norwegian corporation, incorporated in 1965, which does not itself operate as an ocean carrier. Historically, Billabong has had an owner/charter relationship with Star, Star being the operator of the Billabong vessels. Billabong owns, or controls through long term time charter, nine of Star's 19 open-hatch vessels.

11. Agreement 9955 is a means whereby the principals to the agreement may obtain capital necessary to conduct a worldwide service which none of the three could hope to finance individually.

12. Star's Board of Directors, which includes representatives of the three principals, determines overall company policy and financial performance. The Board does not involve itself in actual management, financial details, vessel operation or pricing. Star's rates, practices and operational matters, other than broad policy making, are decisions made by Star's management. The Board of Directors and the principals do not involve themselves in rate-making or pricing decisions, but rather are concerned with overall long term financial results and return on investment. In the latter context, however, the Board may become involved in decisions concerning fundamental rate policies and practices in contrast to individual rate setting.

13. All of Star's vessels are chartered to Star by its principals, and charter hire is paid by Star in proportion to contribution of tonnage and on the basis of Star's net revenues. Star distributes its net revenue to its principals by means of payment for charter hire.

14. Star has 19 open-hatch vessels contributed by Star's principals who either own them or time charter them. "Open-hatch" vessels have hulls which are open boxes having no tween decks but which are subdivided into holds. The hatches extend almost from one side of the ship's hull to the other. These open-hatch vessels are well suited for carrying forestry products and bulk products, since the large hatches permit complete and direct access to the hold, and are also capable of carrying containers, although they are not cellular underdeck, and have not been fitted with container guides.

15. Star's open-hatch vessels, due to their on-board cranes, can load and discharge cargo, whether bulk or containerized, independent of shore-side cranes, and do not normally call at container terminals when transporting containers.

16. With reference to the trade to and from United States West Coast and British Columbia ports, Star's primary involvement, includ-

ing the design and suitability of its vessels and their cargo handling equipment, is the carriage of forestry products to Japan, Korea, North Europe and the Mediterranean. For Star, forestry products are the core of Star's service and the reason for Star's choice of ships.

17. The philosophy of Star has been and is to remain a ship operator and to minimize interest in terminals, other land-based installations and containers. Because of this philosophy, Star adopted FAK (freight-all-kinds) rates. Star approaches rate-making from the standpoint of renting space on a vessel.

18. Even absent the vessels contributed by W-L, Star would still endeavor to charge FAK rates, and the departure of W-L would affect neither Star's rate structure nor rate level.

19. For as long as Star has been involved in the inbound transpacific trade, it has maintained an FAK rate structure (Star Shipping Eastbound Freight Tariff, FMC No. 7).

20. Star also has an FAK per container rate structure in the Europe-United States West Coast trade (Star Shipping Westbound Freight Tariff No. 1, FMC No. 3).

21. Between 3.5 and 4 percent of Star's worldwide gross revenues are represented by revenues obtained in the inbound transpacific trade.

22. The outbound transpacific revenue exceeds inbound transpacific revenue by a better than 3-to-1 margin.

23. Star is the largest carrier of forestry products in the outbound transpacific trade.

24. Star carries 70 percent of its world wide movement of forestry products from British Columbia and 30 percent from the United States West Coast.

25. 500,000 tons of forestry products move on Star from the United States West Coast, 135,000 tons of which are destined for Japan and Korea.

26. For Star, the outbound movement of forestry products is Star's primary movement in the transpacific trade.

27. The inbound transpacific trade is considered secondary by Star.

28. Star's vessel scheduling practices are based on the needs of the forestry products movement.

29. Although Star was offered the opportunity to carry containerized cargo from Taiwan to the United States West Coast, it did not avail itself of that cargo because of scheduling commitments to the movement of forestry products.

30. Star's policy in the inbound transpacific trade is to maximize vessel employment and Star's revenues in order to enable Star to be rate-competitive in the outbound transpacific trade.

31. The Star open-hatch vessels are especially well-suited to the carriage of forestry products due to their large hatches and on-board cranes which enable forestry products cargo to be loaded and discharged in a rapid, efficient, and economical manner.

32. The Star open-hatch vessels are also especially well-suited to the carriage of chemicals and fertilizers in bulk due to their large hatches and on-board cranes which enable chemicals and fertilizers in bulk to be loaded and discharged in a rapid, efficient and economical manner.

33. The continuation of the Star service at its present level is essential to the continued ability of United States West Coast forestry products exporters to sell their products in foreign markets.

34. Star provides service at United States West Coast ports which do not normally receive service from liner vessels, such as Eureka, California, and Coos Bay, Oregon. Such service facilitates the export of United States forestry products.

35. Star provides container service from ports in Japan to Tacoma, Washington, and provides bulk cargo service between ports in Europe and San Diego, California. Such service is important to the economic well-being of those ports.

36. United States West Coast exporters of forestry products have no alternative to Star's service since:

A. Other liner operators are usually unwilling to call at those U.S. West Coast ports, at which forestry products exporters find it economically feasible to tender cargo to ocean carriers.

B. Other liner operators do not offer service comparable to Star in terms of suitability of ships or cargo handling equipment.

C. Rates charged by other liner operators, particularly conference liner operators, are such that American forestry products would not be able to compete in world markets if transported by liner carriers other than Star.

D. Other liner operators, particularly conference liner operators, are unwilling to carry forestry products if better-paying cargo is available.

37. In the conduct of its business, Star adheres to its published tariffs.

38. In 1973, Star had a calculated capacity of 8,365 forty-foot equivalent containers in the inbound transpacific trade.

39. In 1973, Star carried 1,858 loaded containers (forty-foot equivalents) in the inbound transpacific trade, on 23 voyages for 57 different shippers.

40. In 1973, Star's vessel utilization rate for the inbound transpacific trade (in terms of container capacity) was 22 percent.

41. In 1973, Star's loaded container carryings expressed in terms of

twenty-foot equivalent units (TEU) were 1.9 percent of the loaded container carryings of the members of the TPFCJ/K.

42. The basic United States port call pattern for Star in the inbound transpacific trade is that one vessel will call at Tacoma, and the next inbound vessel will call at Los Angeles.

43. The following table describes the distribution of Star's service to major shippers of containerized cargo in the TPFCJ/K trade in 1973:

SHIPPER	NO. OF 40 FEU	PERCENTUM OF STAR'S TOTAL 1973 CONTAINER CARRYINGS	CUMULATIVE PERCENTUM OF STAR'S TOTAL 1973 CONTAINER CARRYINGS
1	901	48.5	48.5
2	599	32.2	80.7
3	208	11.2	91.9
4	42	2.3	93.6
5	32	1.7	95.9
6	19	1.0	96.9
7	17	0.9	97.8
All Other Shippers	40	2.2	100.0
TOTAL	1,858	100.0	100.0

44. A representatiave itinerary for a Star vessel in the transpacific trade in 1973 would be for the vessel to load forestry products cargo at U.S. West Coast ports such as Eureka, California, and Coos Bay, Oregon, then to sail to British Columbia to load forestry products cargo, then sail to ports in Japan where the forestry products cargo would be discharged and containers loaded (though not necessarily at the same ports) and then sail to Los Angeles or Tacoma where the containers would be discharged and the vessel would then sail to Eureka or Coos Bay to load forestry products.

45. In the inbound transpacific trade, Star advertises its sailings regularly in publications in the Far East and the U.S. West Coast which enjoy general circulation in the Shipping Community.

46. Star also distributes its sailing schedules to approximately 100 shippers and ports in Japan.

47. Star makes no distinction between large and small shippers in its solicitation efforts.

48. The institution of a dual-rate contract by the TPFCJ/K on October 1, 1973, impaired Star's ability to obtain a broad range of commodities for its transpacific inbound container service.

49. The service offered by Star to shippers of containerized cargo in the inbound transpacific trade is a "second-class" service since Star does not provide intermodal services such as arrangement of inland movement within the United States, does not provide CFS service, does not provide the frequency or definiteness of schedule offered by TPFCJ/K carriers, and does not offer speed in ocean transit comparable to what some of the TPFCJ/K containership operators can offer.

50. In order to compensate for its service deficiency, Star seeks to compete on a rate basis.

51. Star publishes rates which decrease with the number of containers tendered by the shipper. The per container rates applying from Japan to the U. S. West Coast are as follows:

FORTY-FOOT CONTAINERS:	
One container, but less than 10	$1,975.00
10 containers, but less than 20	1,925.00
20 containers, but less than 40	1,875.00
40 containers, but less than 70	1,825.00
70 containers, but less than 100	1,775.00
100 containers and over	1,725.00
TWENTY-FOOT CONTAINERS:	
One container, but less than 20	$1,015.00
20 containers, but less than 40	990.00
40 containers, but less than 80	965.00
80 containers, but less than 140	940.00
140 containers, but less than 200	915.00
200 containers and over	890.00

(7th Revised p. 29-A, Star Tariff, FMC No. 7).

52. Witnesses for Star testified that there were some savings in administrative costs when the same shipper tenders a large number of containers. However, witnesses could not quantify the amount saved. The primary reason for the volume incentive rates was to insure that Star had sufficient containers in its eastbound service. The management of Star was concerned that it would be operating the service with only a few containers.

53. The utilization of Star's volume incentive rates (east-bound) during 1973 was as follows:

VOLUME	*CONTAINERS IN 40 FEU*	*PERCENT OF TOTAL CONTAINERS*
Category I (e.g. Minimum 1 but less than 10)	222	11.9
Category II (e.g. 10 containers but less than 30)	181	9.8
Category III (e.g. 30 containers but less than 50)	294	15.8
Category IV (e.g. 50 containers but less than 100)	849	45.7
Category V[3] (100 containers and over)	312.5	16.8
TOTAL	1,858.5	100.0

54. Star allows a reduction of freight per container (eastbound) where shippers use containers owned or leased by them and delivered directly to the container yard. The reduction for a twenty-foot container is $250.00; the reduction for a forty-foot container is $400.00. (Star's Eastbound Freight Tariff No. 1, FMC No. 7, 2nd Revised p. 20). The actual cost savings to Star which are realized

[3]The five categories of volume incentive rates shown in 1973 were expanded to six categories in 1974.

when a shipper owned or leased a forty-foot container is utilized are:

Lift-on charge at the leasing company depot	$ 20.00
Lift-off charge at Star's CY	20.00
Drayage (leasing company to Star)	50.00
Lease (including drop-off charge)	280.00
Allotment for return of container	40.00
TOTAL	$420.00

55. According to one study, an average of 76 percent of the total tonnage carried by Star on 18 eastbound voyages between 1972 and 1974 was electronic goods or 91.8% of the containerized cargo carried.

56. Howard Harrington, Vice President and General Manager of Star Shipping (USWC), Inc., testified that electronic goods comprise a large percentage of Star's total tonnage eastbound. In 1973, it has been estimated that Star carried roughly 80,000 revenue tons of such goods.

57. Star carried no Auto Parts, motorcycles, footware or porcelainware, which are lower rated commodities that the TPFCJ/K and Sea-Land listed as major moving commodities in the trade.

How Sea-Land Operates

58. Sea-Land is a large containership operator offering a broad range of services in the eastbound transpacific trade. Cargo tendered to Sea-Land is received at the container freight station or container yard in Japan and, in the case of local traffic, is delivered to a container freight station or container yard in a U. S. Pacific Coast destination port. Stripping and stuffing services are provided for less than trailer-load shipments in both the U. S. and Japan. In the case of OCP cargo, it is placed on railcars at points of interchange. The consignee receives it either at rail ramp or his door depending on the rail service. Mini-bridge cargo is delivered to the rail terminal in the port for further movement inland pursuant to a joint through service. Sea-Land advertises that its fast service saves the shipper money in the form of interest which must be paid on goods which are in transit.

59. Sea-Land estimate that its capital investment in containerization has been approximately $1.5 billion, of which approximately $600 million is attributable to its transpacific service. Five SL7 vessels are employed by Sea-Land in the transpacific service. Each of the vessels, which are leased, has an assigned value of approximately $55 million for a total of $275 million. In addition, Sea-Land owns feeder vessels valued at $34 million and charters feeder vessels with a capitalized value of $8 million. Investment in containers, chassis, power equip-

ment and other equipment amounts to $78 million. Leased shoreside facilities are capitalized at $111 million, leased cranes at $23 million and other investments of $56 million.

60. Approximately 83 percent of Sea-Land's total expenses in its transpacific operations are of a fixed nature and do not vary with the amount of traffic.

61. Sea-Land has made a business decision to invest in shoreside facilities. However, Earl B. Hall, Sea-Land's Treasurer, conceded that all container operators need not lease their shoreside facilities as does Sea-Land.

62. At the time Sea-Land made the capital investment decision to place six SL7s in the transpacific trade, it was projected that the vessels would make 104 sailings a year. It was anticipated that the SL7s would operate at 82 percent utilization eastbound.

63. The SL7 was designed to carry 1,096 35/40 foot containers and operate at a maximum speed of 33 knots. However, the SL7s deployed in the transpacific trade are being operated at 22 1/2 knots, or approximately 10 knots slower than their maximum speed.

64. Since 1972, when the decision was made to place six SL7s in the transpacific trade, the price of fuel has risen dramatically. In 1972, the price of fuel was approximately $3.00 per barrel, currently it is $11.00 to $12.00 per barrel. Using figures estimated by Star as Sea-Land's fuel consumption, it was calculated that at 22 rather than 33 knots Sea-Land would save approximately $53 million a year.

65. Although it was originally planned that six SL7s would operate in the transpacific trade, only five are actually in service. The sixth vessel is being used for relieving the other vessels for drydocking. At some point in the future, it will be assigned to a trade; however, Sea-Land has not announced its plans in this regard.

66. By operating its five SL7s at 22 1/2 knots, Sea-Land anticipates that it will make 52 sailings a year in the transpacific service instead of the projected 104 sailings. This would produce 56,000 eastbound container spaces annually. If the same vessels were operated at near maximum speed, they could produce over 72,000 container spaces annually.

67. Actually, Sea-Land had 55,551 available container slots in the eastbound transpacific trade during 1973. It carried 54,505 containers during the year giving it a utilization of 98.1 percent.

68. Sea-Land requires a utilization factor of approximately 90 percent in order to break even on earnings after making allowance for operating expenses, capital cost and interest expense associated with the trade.

69. Sea-Land depends heavily on electronics not only as a large

segment of tonnage on its vessels but also as a contributor to achieve overall revenues required by Sea-Land. A deterioration of the higher rated portion of the cargo mix could erode the profit opportunities for Sea-Land.

70. U. S.-flag carriers carried 298,718 revenue tons of electrical goods eastbound in the trade or 41.3 percent of the total electronic goods moved by members of the TPFCJ/K. Sea-Land carried 143,372 revenue tons of electronic goods in 1973 or 48 percent of that carried by all U.S.-flag carriers in the conference.

71. The electronics market continues to grow in Japan and Sea-Land's share of that market continues to grow.

72. Sea-Land, as a TPFCJ/K member, utilizes the TPFCJ/K tariffs. It strongly supports commodity type tariffs of the sort published by TPFCJ/K as opposed to FAK type tariffs of the sort published by Star.

73. In setting the level of commodity rates, Sea-Land takes into account the value of service; that is, the value of the service to the cargo interest. Speed and regularity of service are also important. Sea-Land also considers the value of the commodity itself and its ability to pay the rate.

74. Sea-Land prepared a study showing the cargo consists of two consecutive SL7 voyages which sailed in May 1974. The study demonstrates the wide range of commodities carried by Sea-Land under commodity rates. The commodities range from relatively high-rated commodities such as TV cameras to relatively low-rated items such as automotive parts. The lowest gross freight shown is $42.04 per revenue ton. By comparison, a shipper tendering Star only one 40-foot container loaded with 47 tons of cargo would, in effect, be charged $42.02 a ton or $1,975 a container.[6]

75. Below listed are the gross revenues, tons loaded by measurement tons, and the stowage factor by long tons of the ten leading commodities shipped via Sea-Land; first for the Japan-U.S. Pacific Coast trade, and then the Korea-U.S. Pacific Coast trade for the period July 1 through December 31, 1973:

Commodity	*Stow Factor (L/T)*	*M/T*	*35' Box Gross Revenue*
JAPAN			
Elect GDS	5.4	40	2258
Tuna	1.7	18	1462
Auto Parts	4.3	40	1701
Motorcycles	4.1	30	954
Machinery	1.9	40	2564
Syn Mfg	4.0	40	2664
Porcelainware	3.8	40	1454

[6]Under Star's volume discount plan, a shipper tendering certain numbers of containers would be charged lower rates. The lowest possible rate (over 100 containers tendered) would be $36.70.

Toys Novelties	6.7	40	1842
TV's	5.4	40	2030
Musical Inst.	6.4	40	2187
KOREA			
Syn Mfg	4.0	42	2630
Footwear	4.6	42	1929
Cotton Textiles	2.2	42	2616
Elect GDS NOS	5.4	42	2346
Toys	6.7	42	1817
TV's	5.4	42	2108
Musical Insts	6.4	42	2159
Sporting Gds.	4.8	42	2244
Tuna	1.7	18	1364
Auto Parts	4.3	42	1667

76. Sea-Land's fully allocated expenses for handling loaded 35-foot containers from Yokohama to Oakland were as follows:

For an average container of electronics	$1,697
For an average container of all commodities	$1,595
For an average container of motorcycles	$1,542

Vessel operating expense, terminal marine, terminal land and maintenance, both fixed and variable, are allocated on a per container basis. Part of the administrative expense and part of the sales expense are allocated on the basis of revenue derived from the carriage of the container. Cargo claims are allocated on the value of the commodity. The administrative, sales and claims expenses are the only ones which vary with the commodity carried. Sea-Land did not make any study to develop the different cost characteristics that are attached to each commodity.

Sea-Land's Views on Nonconference and FAK Practices

77. Ronald B. Gottshall, Director of Pricing, Far East, for Sea-Land, sees two primary faults with an FAK rate structure such as Star's. It does not recognize that some commodities are unable to pay the level of FAK rates and still market their goods. Additionally, Mr. Gottshall maintains that it places a ceiling on the rate structure.

78. The TPFCJ/K was requested to establish, by a number of major importers in the U. S., container or volume rates on a variety of commodities. The conference set up a committee, of which Mr. Gottshall was a member, to study the proposals. The committee concluded that, except for documentation, there were no cost savings which might be passed on to the shipper for tendering a volume shipment. The administrative savings are far less than the $50 differential per container at the various container incentive breaks in Star's rate structure. Mr. Gottshall would be happier if Star discontinued volume incentive rates and simply published an FAK rate at close to fully distributed cost.

79. Prior to this proceeding, Sea-Land had difficulty determining what Star was doing in the trade. In describing Star, Mr. Gottshall testified, ". . . they are almost invisible." Mr. Gottshall stated that the only thing Sea-Land could find out about Star was that they had sailings.

80. Sea-Land was aware that Matsushita, an exporter of electronics, was shipping with Star; however, Sea-Land did not know the volume of traffic because the total volume of Matsushita traffic had never been determined. Matsushita shipped with Sea-Land in 1969 but was never a major account in terms of their total volume. Sea-Land had some of their business as did other carriers.

81. A number of electronics firms did not sign conference dual-rate contracts. For example, Sony did not sign a contract, but uses a mix of nonconference and conference vessels. Sanya recently terminated its dual rate contract. A number of electronics exporters are moving to the nonconference lines—Star, Tokai, Sea-train or Orient Overseas Container Line (OOCL). Initially, 65 to 70 percent of the electronics firms signed dual rate contracts. At present, about 50 percent are contract signatories.

82. When asked to quantify the direct effect that Star has had on Sea-Land up until the present day, Mr. Gottshall replied:

> The direct effect would be loss of some of the Matsushita cargo that they could handle. So that would be a direct effect. There is other cargo on there being handled by NVOCC's, of which, presumably, some of that cargo was cargo which was previously handled. We can't always identify exactly who it was or what it was, but it was presumably there.
>
> Now, obviously, you say we're sailing at 98 percent. That's true. On the other hand, we carry a disproportionate number of motorcycles. We carry a lot of tuna fish. And we carry a lot of commodities that are on the low-rated side. Because we are reasonably cost efficient, we can handle these and make an overall profit. But maybe it's not the profit we could have made, had we had a mix that hadn't been affected by some of our better cargo flowing to Star.
>
> So in terms of quantifying an invisible is a little difficult. Those are the things I think of happening.

83. Star is not the only nonconference carrier which carries electronic goods. FESCO is a substantial carrier of electronic goods, including "white goods" (refrigerators, washers, and home appliances). Approximately 20 percent of the tonnage carried by OOCL is electronic goods. Rates maintained by FESCO and OOCL are below those maintained by the conference. The reduced rates of FESCO caused the conference to reduce its rates on electronics.

84. Seatrain and Tokai have tariffs with FAK and volume incentive rates. Mr. Gottshall testified that these rates tend to attract higher

rated commodities such as electronics. If Star stopped utilizing volume incentive and FAK rates but Seatrain and Tokai continued to use them, Mr. Gottshall concedes that this traffic would flow to them.

A. Seatrain publishes a tariff which includes FAK rates in addition to commodity rates. FAK rates from Japan or Korea vary from $2,000 per 40-foot container to $2,800 (Seatrain International, S.A., Japan/Korea Eastbound Pacific Coast Freight Tariff No. 615, FMC 61, 4th Revised Page 131-A).

B. Tokai Line publishes a tariff which includes FAK rates in addition to commodity rates. FAK rates from Japan vary from $1,825 per 40-foot container to $1,975 (Tokai Line Local and Overland Freight Tariff, FMC 2, 8th Revised Page 68).

85. Sea-Land estimates the average weekly capacity of FESCO at 1,010 TEUs; Seatrain at 325 TEUs and OOCL at 505 TEUs. Star's capacity is estimated at 200 TEUs per week. (Star does not actually provide a weekly service, rather it is roughly a bi-weekly, irregular service).

The Views of Sea-Land's Expert Witness

86. Elliot Schrier, President of Manalytics, Inc., appeared in this proceeding on behalf of Sea-Land. He was retained by Sea-Land to study the record in the proceeding and testify as to the consequences of approval of Agreement 9955–1.

87. Mr. Schrier testified that Star does not maintain regular schedules or advertise to the extent liner carriers do, nor does it offer commodity rates or attempt to attract a broad range of shippers and commodities. He concluded that Star's pricing is detrimental to the liner operators in the Far East—U. S. West Coast service. Mr. Schrier's conclusion that Star does not maintain regular schedules was based on the fact that he could not find schedules in the publications which he checked. Mr. Schrier did not compare the advertising of some of the smaller members of TPFCJ/K with that of Star. Finally, he did not make any investigation of Star's marketing efforts in Japan.

88. Mr. Schrier conceded that he was not aware of a trade in which the FAK rates charged by one carrier has totally driven out commodity rates in the trade. Furthermore, he admits that the three year participation of Star in the transpacific trade has not led to a rate war.

89. Mr. Schrier attempted to show what would occur if other "neo-bulk" carriers adopted Star's method of operation. He concludes that disruption of liner operations would be extensive.

90. Mr. Schrier's projection regarding other "neo-bulk" carriers is based on a sample of 300 ships from the "Bulk Carrier Register 1973."

He assumes that these vessels could be converted to carry containers and attempts to estimate their container capacity.

91. Mr. Schrier was not aware of any specific non-liner that wanted to convert to this sort of operation if Agreement 9955–1 were approved. He was not aware of any bulk vessels that have actually carried containers from Japan and Korea to the United States.

92. Mr. Schrier could not recall if any other open-hatch vessels (other than Star's) were included in this study.

93. Mr. Schrier did not know how many of the 300 vessels in the study had on-board cranes for containers. He did not know whether the shore facilities in Japan were generally available to bulk carriers for loading and discharge of containers.

94. Mr. Schrier has made no study of the itineraries of the 300 vessels.

95. Mr. Schrier did not investigate the exact disposition or configuration of any ship in the 300 ship study. Moreover, he did not determine the strength of the hatch covers and their suitability for supporting loaded containers.

How the TPFCJ/K Operates

96. The TPFCJ/K geographically embraces the trades from ports in Japan and Korea to Pacific Coast ports of the United States, and to inland points via such ports. The conference publishes a port to port tariff including both local and OCP rates and a minibridge tariff naming joint through rates to East Coast ports.

97. At present the TPFCJ/K has 16 member lines. The conference began the year 1973 with 19 members; however, Seatrain Lines, Inc., and Transportation Maritime Mexicana dropped out of the conference during the year. In addition, American Mail Line merged with American President Lines, Ltd.

98. The member lines of TPFCJ/K range from fully containerized carriers such as Sea-Land to largely breakbulk carriers such as Barber Lines. While the conference members collectively offer a wide range of services, not all carriers in the conference offer the same services. In all cases, however, the conference members provide container freight station service for less-than-trailerload shipments. Those TPFCJ/K members which operate westbound in the trade provide essentially the same services. However, some carriers do not operate in the westbound trade.

99. During 1973, the TPFCJ/K member lines provided a minimum of 34 monthly sailings. According to conference statistics, the member lines had a total of 1,134 sailings during 1973. In calculating the num-

ber of sailings, however, the voyages of vessels operated by members of Japanese space charter agreements (FMC Agreements Nos. 9718, 9731 and 9835) were counted as separate voyages by each of the lines having space aboard the vessel. A single voyage thus might be counted as a separate voyage by as many as six different lines. Thus, the number of physical sailings was considerably less than reported in the conference statistics. Moreover, the conference statistics included sailings of four Korea feeder vessels inadvertently reported by Mitsui OSK Lines, Ltd.

100. TPFCJ/K members had 535,000 container slots available during 1973. A portion of these container slots were "budgeted" to the TPFCJ/K trade. The number of container slots "budgeted" is a matter of individual company policy and may be adjusted at will. With the exception of Sea-Land, various methods used by conference members for determining the number of container slots to be "budgeted" to the trade were not explained.[7] Thus, the number of "budgeted" slots is not a meaningful figure.

TPFCJ/K's Views on the Trade

101. James E. Mazure, the Chairman of TPFCJ/K, stated that he considers the eastbound transpacific trade overtonnaged. His statement is largely based upon a comparison of the "budgeted" slots with the 197,591 TEUs carried by member lines during 1973. Regardless of this particular source material, however, it is conceded by all parties that the trade is overtonnaged.

102. Mr. Mazure stated that the United States flag lines are contributing a large part of the overtonnaging. During 1973, American President Lines converted vessels to containerships. States Lines currently plans to add roll-on/roll-off vessels in the trade. Clearly this will increase conference container capacity. The conference has taken no action to restrain its members from adding tonnage to the trade.

103. Nonconference lines are also contributing to the overtonnaging. FESCO, OOCL and Seatrain all operate full container vessels. FESCO is placing more cellular container vessels in the trade.

104. The tariffs maintained by TPFCJ/K name commodity rates only and have no FAK provisions. The conference, in setting commodity rates, takes into consideration the ability of the commodity to pay the rate. Mr. Mazure assumed that all commodity rates cover the fully distributed costs of every member line; however, he conceded that he had no method of checking on individual member lines.

105. The members of TPFCJ/K carry a wide range of commodities;

[7] As will be discussed below, this matter became the subject of an offer of proof under Rule 10(1), 46 CFR 502.132.

however, electrical goods are most important commodities to the conference from the standpoint of revenue. Mr. Mazure estimates that Star carried more electrical goods than any single conference member except Sea-Land; thus he concludes that Star's FAK rate structure constitutes a serious competitive threat. He disclaimed any special knowledge of the extent to which other nonconference lines carry electronic goods.

106. Mr. Masure also testified that low rates, such as those maintained by Star, coupled with overtonnaging tend to encourage rebating and other malpractices in the trade. He testified that carriers with higher rate levels have a greater incentive to engage in malpractices in order to meet the lower rates of competitors. He also agreed that the conference generally maintains rate levels which are above those of the nonconference lines.

107. Mr. Mazure has no direct knowledge of malpractices in the trade committed by Star. However, he assumes that since conference members commit malpractices from time to time, nonconference lines do as well.

108. Mr. Mazure concludes that Star only solicits a few large shippers in the inbound trade from the fact that Star only carried cargo for 57 shippers inbound during 1973. Mr. Mazure has no direct knowledge of Star's solicitation efforts nor does he know whether Star is turning down shippers. Mr. Mazure admits that the results of a sales program do not always reflect its intensity, particularly where the customer is restricted from exercising a free choice. He further admits that the dual rate system is this sort of restriction on customer choice.

109. At present, the conference has in effect a $13.00 per ton bunker surcharge and a 5.5 percent currency surcharge. Mr. Mazure concedes that the fuel crisis and currency revaluations have affected conference members to varying degrees.

DISCUSSION AND CONCLUSIONS

The Issues

Analysis of the lengthy briefs and extensive evidentiary record demonstrates that the primary issues for decision focus on the question of jurisdiction over the subject agreement and on questions relating to Star's tariff and ratemaking practices in the inbound transpacific trade. As noted previously, Star objects to the extension of this investigation into rate-related issues and furthermore contends violation of the notice provisions of the Administrative Procedure Act. I now proceed to a resolution of these issues.

Jurisdiction

Star contends that section 15 jurisdiction does not attach to the subject agreement on several grounds but, assuming jurisdiction, would limit it solely to the W-L/Star relationships set forth in the agreement. The basic thrust of Star's contentions is that the agreement, although designated as a "joint service," is in fact a corporate venture organized under Norwegian law in which Star has emerged as the result of a completed event, *i.e.*, the contribution by three shareholders of capital and vessels. Under this theory section 15 jurisdiction would be lacking both because of the nature of the undertaking, *i.e.*, the formation of a corporate enterprise protected by Norwegian law, and the fact that there are no separable ongoing relationships over which the Commission can maintain surveillance. These factors would remove section 15 jurisdiction under the doctrine enunciated in *American Mail Line Ltd. et al. v. Federal Maritime Commission*, Slip Opinion, June 28, 1974 (D.C. Cir.) (hereinafter the *Sea-Land/U.S. Lines* case). Star argues furthermore that the subject agreement pertains to conglomeration of capital of a type found in section 5 of the Interstate Commerce Act, *i.e.*, merger or control of one carrier by another, even though separate carrier entities continue to exist and compete (*i.e.*, Star and W-L). Moreover, the argument continues, the agreement is really between non-competitors, Star operates in a different type of business from two of its owners (Billabong and Olsen) and in different trades from its only carrier owner (W-L), the agreement really creates rather than destroys competition and is not a *per se* or other type of violation of the antitrust laws. Finally Star emphasizes the Norwegian situs of the agreement and contends that Commission jurisdiction cannot attach if for no other reason than under principles of international comity and, in essence, the impropriety of dictating to foreign nationals about events consummated on foreign soil under foreign law.

Sea-Land, TPFCJ/K, and Hearing Counsel all take the position that Commission jurisdiction attaches on several grounds. Sea-Land contends that two carriers operating in U. S. trades are parties to the agreement and that a third (Billabong) is in reality merely the alter ego of Star. Under Clause 18 of the agreement, moreover, Sea-Land contends that all of the parties to the agreement are willing to assume the identity of common carriers for purposes of obtaining additional voting rights in conferences to which Star may belong. As to the subject matter of the agreement, Sea-Land contends that it falls within the scope of the seven enumerated categories of agreement in

section 15 [8] such as rate fixing, since the Board of Directors of Star (on which W-L representatives sit) can under certain circumstances exercise some control over rate-making policies, conferring special privileges, since the principals of Star enjoy special rights in connection with attempts of any one of them to dispose of his ownership interest, controlling competition, since Star operates in the U. S. West Coast-/foreign forestry product market but not to South America, where one of its owner (W-L) operates, pooling of earnings, since Star distributes its earnings to its principals in the form of charter hire, and establishing a cooperative working arrangement in connection with Star's vessel construction program and commitments of vessels by Star's owners.

TPFCJ/K argues similarly that jurisdiction attaches to the agreement since two of the parties, W-L and Star, are admittedly common carriers even if the other two owners (Billabong and Olsen) are not, although TPFCJ/K believes that common carrier status can be imputed to them as parties to a cooperative arrangement. As to the subject matter of the agreement, TPFCJ/K perceives section 15 involvement in an agreement in which principals commit themselves to charter vessels to another, furnish crews, divide revenues and retain control over the chartering party. TPFCJ/K has no doubt that these arrangements involve ongoing rights and responsibilities necessitating continuous Commission supervision, thus falling within section 15 under the doctrine enunciated by the Supreme Court in *Federal Maritime Commission v. Seatrain Lines,* 411 U.S. 726, 729 (1973).

Hearing Counsel's argument on jurisdiction rests on the fact that the owners of Star share the profits and apportion losses among themselves and their agreement is thus one "pooling or apportioning earnings, losses, or traffic" as set forth in section 15 and is furthermore a "cooperative working arrangement" under the broad interpretation of section 15 followed by the Court in *Volkswagenwerk v. Federal Maritime Commission,* 390 U.S. 261 (1968). Furthermore, Hearing Counsel contend that the agreement establishes an ongoing relationship among the owners and Star and does not constitute a merger between Star and W-L, which exercises only limited control over Star as a part owner, thus distinguishing the situation from that in the *Sea-Land/U.S. Lines* case in which the Court commented that a change

[8] The seven categories enumerated in section 15 are agreements:
[1] fixing or regulating transportation rates or fares;
[2] giving or receiving special rates, accommodations, or other special privileges or advantages;
[3] controlling, regulating, preventing, or destroying competition;
[4] pooling or apportioning earnings, losses, or traffic;
[5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports;
[6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;
[7] or in any manner providing for an exclusive, preferential, or co-operative working arrangement.

of ownership had resulted "in a single corporation controlling both parties." *Sea-Land/U.S. Lines* case, cited above, slip opinion, p. 23.

The jurisdictional arguments are responsive to the concern of the Presiding Judge expressed early in the proceeding and periodically throughout regarding jurisdictional issues. This concern arose because of the peculiar nature of the agreement and its signatories. Because of the termination of Olsen's common carrier operation in U. S. foreign commerce, it appeared at first blush that only one carrier (W-L) may have entered into an agreement with two non-carriers, which agreement furthermore resembled articles of incorporation. According to the Commission's decision in *Grace Line, Inc. v. Skips A/S Viking Line et al.*, 7 F.M.C. 432, 447–49 (1962), an agreement between two shipowners establishing a joint service (Viking Line) did not fall under section 15 because the two parties forming the joint line were neither carriers nor other persons subject to the Act and could not be construed to be carriers merely because of their role in the formation of the line. It is elementary, of course, that there must be more than one party to an agreement who is subject to the Act before section 15 jurisdiction attaches. *Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134, 140 (1936). Furthermore, according to the Court in the *Sea-Land/U.S. Lines* case, cited above, agreements pertaining to the establishment of ownership interests, such as consolidations and mergers are not the types of agreements falling within one of the seven categories enumerated in section 15.

Having the benefit of a full record and the cogent arguments of counsel, it appears to me that a somewhat different picture of the Star agreement emerges which demonstrates that it is not merely an ownership or incorporation type agreement but also an ongoing joint service/chartering arrangement in which at least two carriers, W-L and Star, are participating.

At the very outset is the fact that the basic agreement (No. 9955) is entitled "Memorandum of Joint Service and Chartering Agreement" and that four parties are named thereto, not merely the three principals (W-L, Billabong, and Olsen), but Star as well. There are, therefore, two active common carrier participants, W-L and Star. The agreement states that its purposes are "to provide a procedure by which Star Bulk (the previous name of the joint service) shall be the vehicle through which the other parties hereto conduct a joint service; (2) to provide for the chartering of vessels owned or managed or controlled by Billabong, Westfal-Larsen and Fred. Olsen to Star Bulk; (3) to provide for the operation of such vessels by Star Bulk so that the profits derived or losses sustained therefrom will be divided among Billabong, Westfal-Larsen and Fred. Olsen in proportion to their respec-

tive commitments of vessels to Star Bulk, and (4) to provide for the corporate management of Star Bulk in such manner as will accomplish the foregoing purposes."

This agreement therefore establishes an ongoing joint service with chartering arrangements and further provides for apportioning profits or losses among the principals in accordance with their respective vessel contributions. Other provisions of the agreement give W-L a 30 percent interest in the corporate venture while Olsen and Billabong enjoy a 30 and 40 percent share respectively. W-L is entitled to appoint two members of the Board of Directors while Olsen and Billabong may appoint two and three members respectively. Corporate action may not be taken unless approved by four members of the Board "but must include the approval of at least one director representing each of the three shareholder groups."

The agreement reiterates that "from time to time Billabong, Westfal-Larsen, and Fred. Olsen will time-charter vessels owned, managed or controlled by each of them to Star Bulk for employment in the Joint Service." Other provisions in the agreement specify that if conference regulations allow, each of the parties to the Star agreement shall acquire membership in the particular conference, that Star shall operate world-wide as determined by the Board of Directors, that Star may purchase or charter additional ships from persons other than its principals, and that revenues and expenses pertaining to such vessels will be included in the calculations by which charter hire to the principals is determined.

Aside from the terms of the agreement itself several other facts should be noted. The record indicates, for instance, that although Star's ratemaking practices are generally considered to be a matter for Star's corporate management and not its Board of Directors, under certain circumstances, for example, where losses occurred in a certain trade, where proposals were made to open new services, or where rate of return matters were being considered, the Board would have something to say regarding ratemaking policy. Another fact of some interest is that although Star may operate world-wide as its Board directs and, according to its tariffs on file with the Commission, holds out to provide a service in at least 10 trade areas in the foreign commerce of the United States,[9] it does not operate in the United States/West

[9] I do not know if Star is active in all 10 trade areas but Star does maintain 10 tariffs on file with the Commission which are briefly summarized as follows:

F.M.C. No.	*European Trades*
3	Inbound—Continent & U.K. to U.S. Pacific Coast
6	Inbound—Continent & British Isles to U.S. Gulf Coast
4	Outbound—U.S. Pacific Coast to U.K. and Continent
8	Outbound—U.S. Gulf Coast to Mediterranean Ports
F.M.C. No.	*Far Eastern Trades and Australia*

Coast/South America trade where one of its owners, W-L, is active.

In my opinion, these facts illustrate that the Star agreement is a chartering/joint service arrangement with ongoing relationships and not merely an agreement establishing capital ownership. Therefore, it does not fall outside the scope of section 15 as did the arrangements in *Federal Maritime Commission v. Seatrain*, cited above, and in the *Sea-Land/U.S. Lines* case which involved either consolidations, mergers, corporate organizations, or acquisitions of assets, *i.e.*, agreements affecting ownership without ongoing relationships, which agreements, as in the *Sea-Land/U.S. Lines* case, effectively terminate the independence of an operating carrier. The Star agreement, unlike that in the *Sea-Land/U.S. Lines* case, does not eliminate the separate identity of Star apart fromW-L or the other parties to the joint venture. On the contrary, the very purpose of the agreement is to establish a separate carrier identity, Star Shipping, which "shall be the vehicle through which the other parties hereto conduct a joint service." Not only is Star a viable entity apart from its owners, no one of which has majority control, with separate management, but Star may even purchase or charter ships from persons other than its three owners and, if conference agreements permit, Star and its three owners may enjoy separate voting privileges whenever they choose to join such conferences.

Given that the Star agreement envisions the continued existence of separate, viable entities, including two active carriers, W-L and Star, and consequently is not outside the scope of section 15, it remains to be determined whether the agreement falls within any of the seven categories enumerated in section 15. In my opinion, careful analysis of the operations of the agreement demonstrates that it falls within at least three of these categories, to wit, nos. 2, 3, and 7, to wit, giving special privileges and advantages, controlling competition, and establishing cooperative working arrangements. Furthermore, the agreement bears some resemblance to rate-fixing and pooling, categories 1 and 4 respectively, although it is not necessary to decide the jurisdictional issues on those grounds.

An agreement "giving or receiving special rates, accommodations, or other special privileges or advantages" is the second category enumerated in section 15. Sea-Land contends that the Star agreement

7	Inbound—Japan, Korea, Taiwan to U.S. Pacific Coast
9	Inbound—Australia, Tasmania, New Zealand to U.S. East Coast and Great Lakes
11	Inbound—Australia, Tasmania, New Zealand to U.S. Pacific Coast
13	Outbound—U.S. East Coast, South Atlantic & Gulf Coasts to Japan and Korea
5	Outbound—U.S. Pacific Coast to Japan, China, Korea, Taiwan, Hong Kong, etc.
12	Outbound—U.S. Pacific Coast to Australia, New Zealand, Tasmania

falls under this category because the principals of Star have special rights of first refusal on stock transfer. Though this may confer privileges on the owners it is not clear to me that this type of privilege which relates to ownership interests is really the type envisioned by section 15. However, the formation of a new entity by shipping interests who choose to band together may confer on that entity a special privilege or advantage. In *In the Matter of Agreement FF 71–7 (Cooperative Working Arrangement)*, 14 SRR 609 (1974),[10] six ocean freight forwarders banded together to form a new corporation which was to engage in domestic and international forwarding and purchase inland operating rights from a forwarder enjoying Part IV authority under the Interstate Commerce Act. The ultimate purpose of this new corporate arrangement was to improve the services of the six ocean forwarders by extending the scope of their services to include inland forwarding in combination with ocean forwarding services. The Commission found that the arrangement would serve to increase rather than lessen competition in the multiple service field since parties to the arrangement could compete with outsiders who already offered such multiple services. The fact that the six parties were agreeing to establish a new corporation and become stockholders in it and the fact that this activity would ultimately increase competition by adding a new enterprise into the multiple-service forwarding field did not remove the matter from section 15 jurisdiction.[11] Furthermore, the Commission found that the consummation of the arrangement gave the new corporation "the special accommodations, privileges and advantages inherent in the acquisition of expanded forwarding activities. As a result, we find that such an agreement must fall within the broad scope of section 15, Shipping Act, 1916." 14 SRR at p. 613.

In the instant case, the carrier which results from the subject agreement, Star, enjoys a special privilege and advantage over other carriers with whom it may compete worldwide by being able to charter vessels from its owners who have committed vessels to Star and have cooperated in a vessel construction program. One of the owners furthermore is a carrier (W-L) with whom Star could compete although in fact it does not do so and another (Olsen) is a former common carrier who is theoretically free to reenter United States trades as a common carrier if he so chooses. Star contends emphatically that the subject

[10]Petitions for review of this case have been filed in the U. S. Court of Appeals for the District of Columbia Circuit sub. nom. *Alltransport, Inc. et al. v. Federal Maritime Commission*, Docket No. 74-134 et al. On June 14, 1974, the Commission filed with the Court a Motion for Remand for the purpose of permitting the Commission to clarify and further consider its decision. The motion further indicates that the Commission wishes to reconsider its decision with respect to the jurisdictional scope of section 15.

[11]For similar findings involving an agreement between two parties subject to the Act to form a new carrier which would increase competition in the U.S. West Coast/Hawaii trade, see *Agreement No. DC-27*, 10 SRR 725 (Initial Decision, 1968, agreement later withdrawn).

agreement operates to increase rather than lessen competition since the input of vessels has enabled a new line to emerge on many trade routes with a specialized service praised by its shippers, especially those of forestry products, and one which offers an alternative to TPFCJ/K's services in the inbound transpacific trade. Although this contention is raised by Star as an argument against Commission jurisdiction under section 15, as seen from *Agreement No. FF 71–7,* cited above, the Commission found that the entity resulting from an agreement may enjoy special privileges and advantages precisely because the agreement expanded its services and enhanced its competitive ability.

An agreement "controlling, regulating, preventing, or destroying competition" is the third category enumerated in section 15. As previously discussed, W-L enjoys two votes on Star's Board of Directors and may disapprove any corporate action. Therefore, one carrier, W-L, has some control over the operations of another, Star. Another provision of the agreement (Article 19) provides that Star may operate on any trade routes "as may from time to time appear to the board of directors to be economical and compatible with the available vessels." Although there is no specific evidence that W-L's representatives on the Board have been disapproving proposals that Star enter into the South American trades where W-L is actively engaged, the agreement certainly enables W-L to disapprove any such move by Star. In actual fact, moreover, whether by coincidence or not, Star does not operate in any U. S. trade in which W-L operates.[12]

An agreement "in any manner providing for an exclusive, preferential, or cooperative working arrangement" is the seventh category enumerated in section 15. The Supreme Court has held that this category "was clearly meant as a catchall provision, intended to summarize the type of agreements covered . . ." and stated further that "such clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated." *Federal Maritime Commission v. Seatrain Lines, Inc.,* cited above, at p. 734. In view of the fact that the subject agreement establishes an ongoing joint venture and has characteristics of agreements which give special privi-

[12]Although the fact that W-L has the power to disapprove proposals that Star enter into trades in competition with W-L alone establishes, in my opinion, an agreement "controlling" or "regulating" competition and thus falls within the scope of section 15, the actual fact that the two carriers, W-L and Star, avoid operating in the same trades although both engage in carriage of forestry products from the United States West Coast ports, strongly implies that W-L would not approve of the entry of Star into the trade routes in which W-L is active. Under similar circumstances in a case arising under the Clayton Act, the Supreme Court made such an assumption, stating as follows:

The joint venture, like the "merger and the 'conglomeration,'" often creates anticompetitive dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitive with one another. . . . If the parent companies are in competition, or might compete absent the joint venture, *it may be assumed that neither will compete with the progeny in its line of commerce.* (Emphasis added.) *United States v. Penn-Olin Co.,* 378 U.S. 158, 169 (1964).

leges or advantages and agreements which control or regulate competition, as discussed above, it seems evident that the subject agreement constitutes a "cooperative working arrangement."[13] It bears noting that even in the *Viking Line* case, cited above, in which the Commission found no jurisdiction over an agreement establishing a joint service, it reached this decision because of lack of jurisdiction over the parties rather than over the subject matter of the agreement. In that case the agreement was a joint service/chartering undertaking which formed the Viking Line and bore some resemblance to the Star agreement. (See, *e.g.*, paragraphs 30 and 31, 7 F.M.C. at p. 444). The Commission remarked:

> The agreement between Laly and Imica to create Viking as a berth operator in the Venezuela trade may well be considered to provide for a cooperative working arrangement between them. 7 F.M.C. at p. 448.

Miscellaneous Jurisdictional Contentions

The previous discussion disposes of the contentions of Star that the subject agreement is merely a single event in which a new entity has been established similar to an agreement of incorporation in which no ongoing relationships are established. The previous findings establish, on the contrary, that the agreement is a continuing affair in which special privileges or advantages are conferred, competition is regulated, a cooperative working arrangement is established, etc. Star also contends, however, that section 15 jurisdiction, even if it lies, is restricted to the W-L/Star relationships only, that the agreement is not *per se* violative of the antitrust laws, and that the Commission agreement is one established under Norwegian law, which means that the Commission either has no jurisdiction or should not exercise it under principles of international comity. These contentions can be briefly answered.

If an agreement is subject to section 15 at all it is the entire agreement which must be filed with the Commission even though non-jurisdictional parties are signatories. The Commission cannot dictate

[13]The subject agreement also bears some resemblance to agreements "fixing or regulating transportation rates or fares" and "pooling or apportioning earnings, losses, or traffic," the first and fourth categories enumerated in section 15 respectively. Under some circumstances, the Board of Star, on which W-L places two representatives who enjoy a type of veto power under the provisions of the agreement (Article 9), may decide fundamental ratemaking policies in any particular trade in which Star operates. Although this is not the typical rate-fixing agreement wherein two or more separate carriers agree to charge the same rates, the subject agreement nevertheless allows at least one carrier, W-L, to participate and vote on another carrier's (Star) ratemaking policies.

The subject agreement also provides that the owners of Star shall share the profits or sustain the losses according to a predetermined formula. Although not a typical pooling agreement wherein independent carriers pool revenues and share percentages in a fixed formula, the parties to the Star agreement nevertheless are "pooling or apportioning earnings, losses, or traffic," an activity which falls under the fourth category enumerated in section 15. Cf. *Puget Sound Tug and Barge Co. v. Foss Launch & Tug Co.*, 7 F.M.C. 43, 49 (1962).

to parties outside of its jurisdiction, of course, but it can issue its orders against those signatories who are carriers or other persons subject to the Act and in that fashion disapprove, cancel, or modify an agreement.[14] Section 15 itself requires that "every common carrier by water . . . shall file immediately with the Commission a true copy or if oral, a true and complete memorandum, of every agreement, with another such carrier . . .". The statute does not relieve those parties who are subject to Commission jurisdiction from the filing requirements because of the fact that there are also parties to the agreement who are not subject to such jurisdiction and areas of the agreement which are not the Commission's proper concern. In *New York Shipping Association, Inc. v. Federal Maritime Commission,* 8 SRR 20, 285 (2d Cir. 1974), it was argued that the subject agreement included persons not subject to the Act, to wit, a labor union, and was additionally part of a collective bargaining agreement. The latter fact ordinarily would have placed the agreement under the protection of the national policy favoring collective bargaining and within an area of concern of the National Labor Relations Board. The Court stated:

> An agreement to which such persons [common carriers and other person subject to the Act] are parties is not taken out of section 15 by the fact that persons not fitting that definition, to wit, stevedoring contractors who are not terminal operators, are also bound. 8 SRR at p. 20, 991.

This is consistent with a number of Commission decisions finding jurisdiction over agreements to which parties not subject to Commission jurisdiction are signatories and which involve activities outside the scope of Commission jurisdiction. *New York Shipping Association,* 16 F.M.C. 381, 388–89 (1963), and cases cited therein; *Disposition of Container Marine Lines,* 11 F.M.C. 476, 490, n. 13 (1968).

The courts and the Commission have recognized that agreements may be filed with the Commission which contain portions of no proper concern to the Commission but this situation does not affect Commission jurisdiction over those parties subject to the Act or those areas of the agreement which clearly raise Shipping Act problems. *New York Shipping Association v. Federal Maritime Commission,* cited above at p. 20, 992; *Federal Maritime Commission v. Seatrain Lines, Inc.,* cited above, at p. 729. It is also acknowledged that agreements may overlap into different areas of substantive law and that parties to them may be subject to the jurisdiction of one agency or law for one activity and

[14] Similarly, although the Interstate Commerce Act vests jurisdiction over railroad rates in foreign commerce only to the extent that transportation takes place within the United States, the I.C.C. nevertheless exercises jurisdiction over international joint through rates published in connection with non-jurisdictional parties, *i.e.,* Canadian railroads, since the agency maintains control over the American railroads who are parties. See, *e.g., News Syndicate Co. v. N.Y.C.R.R.,* 275 U.S. 179 (1927); *Lewis, Etc. Co. v. Southern Pacific Co.,* 283 U.S. 654 (1931); *Cyanamid and Cyanide From Niagara Falls,* 155 I.C.C. 488, 492–93 (1929).

another agency or law for another activity. See, *e.g.*, *Atlantic & Gulf/West Coast of South America Conference*, 13 F.M.C. 121, 130–31 (1969). As Mr. Justice Harlan commented in *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 286 (1968):

> Furthermore, I see no warrant for assuming in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both.

The solution to the problem of overlapping jurisdiction is not absolute surrender by the maritime agency of its regulatory responsibilities but caution in exercising its jurisdiction in areas where its expertise is lacking. *Volkswagenwerk v. Federal Maritime Commission*, cited above, at p. 287; *New York Shipping Association v. Federal Maritime Commission*, cited above, at p. 20, 992.[15]

Star also contends that organization of a joint venture by Norwegian nationals on Norwegian soil serves to exclude Commission jurisdiction. Star argues that, unlike cases involving regulation of foreign carriers' rates and practices, which are as much the concern of the United States as of the foreign country involved, exercise of Commission jurisdiction in the present case means "reaching into foreign countries to control inherently local financial and corporate affairs of foreign nationals." Star cites antitrust principles and disavowals by the Justice Department of intentions to prosecute violations of the antitrust laws in cases involving foreign joint ventures. Star concedes, however, that in proper cases where the activities of foreign cartels have direct effect on competition in the U. S. market, the antitrust laws may be applied. See, *e.g.*, *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), affirmed 332 U.S. 319 (1947). Star furthermore cites statements of the Commission that section 17 of the Shipping Act, although literally applicable to foreign terminal activities has never been applied to a foreign terminal operator and a similar statement regarding the application of section 15 to foreign mergers, at a time when the Commission believed it had jurisdiction over domestic mergers. *Merger—American Mail Line and Pacific Far East Line*, 11 F.M.C. 53, 58–59 (1967), overruled as to merger jurisdiction, *Federal Maritime Commission v. Seatrain Lines, Inc.*, cited above, at p. 729.

It is now well settled that neither the nationality of parties, foreign situs nor approval of foreign law insulates an agreement which fits into one of the categories enumerated in section 15 from the reach of that

[15] As the Court stated:

> To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable assessment formula, this does not relieve the FMC of its duty to determine whether the formula is reasonable in its effects on shipping. 8 SRR at p. 20, 992.

statute. Furthermore, in the law relating to extraterritoriality a critical distinction exists between foreign conspiracies in violation of antitrust laws and agreements subject to section 15. Moreover, there is no true conflict between the laws of two sovereign nations and consequently no need for the Commission to refrain from exercising jurisdiction over Norwegian parties absent a showing that the foreign sovereign has in some fashion ordered the parties to operate in a fashion proscribed by American law.

In several cases the Commission as well as the courts have dealt with the argument that the Shipping Act, 1916, and more specifically section 15 have no application to agreements entered into in foreign countries which are not unlawful in those countries. Uniformly, the Commission and the courts have rejected such arguments. In contrast to cases arising under the antitrust laws, furthermore, the Commission has held that jurisdiction does not depend upon demonstrable effects or impacts on commerce in the United States. Moreover, practical difficulties in investigating and regulating activities overseas do not defeat jurisdiction.

In *Investigation, Practices, etc., N. Atlantic Range Trade*, 10 F.M.C. 95, 112 (1966), the Commission stated in this regard:

> We turn now to the allegation that the Commission either has no jurisdiction or should not exercise jurisdiction because the subject activities occurred abroad. We believe the Examiner has ignored the clear language of section 15 and has drawn an improper analogy from the antitrust laws. While the acts under investigation occurred in Italy, they nevertheless had some effect on the commerce of the United States. . . . Furthermore, these practices had significant effect upon the competitive positions of the carriers in this trade who are undoubtedly subject to our jurisdiction. But more importantly, the Shipping Act itself specifically has extraterritorial application; it does not require demonstrable impact on our commerce. It simply refers to all agreements of a competitive nature between common carriers by water in the foreign commerce of the United States. Under this statute, the Commission cannot divest itself of its responsibility because it is difficult to investigate and regulate misconduct which occurred abroad.

In *Unapproved Section 15 Agreements-Spanish/Portuguese Trade*, 8 F.M.C. 596, 600–01 (1965), the Commission similarly observed:

> Respondents' arguments to the contrary notwithstanding, there can at this late date be no serious question as to the so-called "extra-territorial application of the Shipping Act." [Case citations omitted.] . . . Respondents are all common carriers by water in foreign commerce within the meaning of the Act, and there is no question that the agreements in issue are of the kind covered by section 15; . . . [I]n requiring the filing and approval of such agreements as a condition precedent to their lawfulness Congress itself has determined that the agreements by their very nature have an "effect" on our foreign commerce. The precise nature and degree of that effect is irrelevant to any determination as to the applicability of the filing requirements of section 15.

Finally, the Court of Appeals in *Armement Deppe S.A. et al. v. United States,* 399 F. 2d 794 (5th Cir. 1968), cert. denied 393 U.S. 1067 (1969), seems to have put the last nail into the coffin of Star's arguments. In that case the court held that section 15 as well as section 14b of the Act not only applied to foreign carriers but even to the contracts of foreign nationals entered into and executed in foreign countries since these carriers chose to deliver goods to ports in the United States and to employ contracts in American commerce.

The record indicates no requirement in Norwegian law that the parties to the Star agreement operate on American trade routes or that they ignore the requirements of American law, specifically section 15 of the Act, if they choose to operate on such routes. There is therefore no conflict between sovereigns. Finally, the question of jurisdiction under section 15 does not depend upon the status of an agreement under the antitrust laws. Contrary to Star's contention, an agreement may be subject to section 15 without constituting a *per se* violation of those laws. Although approval of an agreement exempts it from the reach of those laws and it is proper for the Commission to consider the extent of an agreement's invasion of such laws under the public interest standard of section 15 (*Federal Maritime Commission v. Svenska Amerika Linien,* 390 U.S. 238 (1968)) the statute is broadly drafted and establishes its own standards and criteria without regard to the antitrust laws. *Volkswagenwerk v. Federal Maritime Commission,* cited above, at pp. 274–75; *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California,* 8 F.M.C. 521, 531 (1965). If it appears, however, that an agreement has minimal impact on competition and little or no intrusion on the policy established by the antitrust laws, this fact may significantly reduce the burden which the proponents of the agreements must sustain in justifying their agreements. *Agreement No. 8760–5,* 14 SRR 45 (1973).

The Relevancy of Star's Ratemaking Practices to the Question of Approvability

The preceding discussion establishes Commission jurisdiction over the subject agreement by virtue of the presence of two parties who are carriers calling at American ports and the nature of the agreement which falls into several of the categories enumerated in section 15. Star contends, however, that even if jurisdiction is found based upon W-L's participation in the agreement, evidence relating to the rates charged by Star is irrelevant to the question of approval under section 15. Star also contends that consideration of rate issues would be a violation of due process

the Commission's Order fails to give notice of such issues. These contentions are quite naturally opposed by TPFCJ/K and Sea-Land, whose protests concentrate on Star's ratemaking practices in the inbound transpacific trade. Hearing Counsel, while urging approval of the agreement, argue that Star's rates are in some ways detrimental to commerce and unfair or unjustly discriminatory within the meaning of section 14 Fourth of the Act.

This particular area of contention involving the scope of the Commission's Order of Investigation has been troublesome as noted previously. The problem stems basically from the Commission's Order which is not clear with regard to the delineation of specific issues. As mentioned previously, the Order refers to the protests of TPFCJ/K and Sea-Land which raise issues pertaining to Star's ratemaking practices in the inbound transpacific trade and initiates an investigation after stating that the protests and reply thereto have been considered. However, the only specific issues framed in the Order are ultimate issues of approvability under the standards of section 15.

If Star's contentions are correct, then its agreement should be approved unconditionally since there is no evidence of record outside of that pertaining to Star's ratemaking practices in the inbound transpacific trade which even remotely suggests that the agreement should be disapproved. On the contrary, the record demonstrates that Star's service has been efficient and responsive to the needs of American exporters of forestry products and has benefited ports such as Eureka, California, and Coos Bay, Oregon, which do not normally receive service from other liner operators as well as ports such as San Diego, California, and Tacoma, Washington.

However, I find that consideration of the issues raised in the protests and briefs of TPFCJ/K and Sea-Land relating to Star's rates is warranted and is properly within the scope of the Commission's responsibility in a section 15 proceeding.

Star's due process argument can be given short shrift under the circumstances of this case. In an administrative proceeding a party is entitled to reasonable notice of the issues in controversy. Section 5(a), Administrative Procedure Act, 5 U.S.C. 554, *Cella v. United States*, 208 F. 2d 783 (7th Cir. 1953). Prior to the issuance of the Commission's Order which commenced this proceeding, however, Star and its adversaries, TPFCJ/K and Sea-Land, had engaged in a preliminary debate involving Star's ratemaking practices as is often the case when an agreement is filed for approval under section 15, undergoes publication in the *Federal Register* and is subjected to comments and protests. The Commission's Order not only specifically refers to the protests and Star's reply, stating that the Commission considered all of these

pleadings before deciding to initiate the proceeding, but frames the issues by including all the standards enumerated in section 15, including the standard pertaining to the issue whether an agreement "is in violation of the Shipping Act, 1916." This is notice that the Commission may make findings that the subject agreement violates any of the substantive provisions of the Act, including sections 14, 16, 17, or 18(b) which would cover unlawful rates or ratemaking practices.

At the prehearing conference held on May 28, 1974, approximately one and one-half months before the hearing commenced (July 15, 1974), the specific problem as to the propriety of taking evidence relating to the level of reasonableness of Star's rates was discussed. All parties were advised by the Presiding Judge that TPFCJ/K and Sea-Land would be allowed to present evidence in support of their protests, *i.e.*, evidence relating to Star's rates. A procedure was further established by which information would be exchanged prior to hearing pursuant to the Commission's discovery processes, portions of which would inform Star as to the specific allegations, including those pertaining to Star's rates, which TPFCJ/K and Sea-Land were raising. At no time did Star petition the Commission to clarify its Order although the suggestion was made at the prehearing conference. Having been aware prior to the issuance of the Commission's Order that Star's rates were being questioned and at the time of the prehearing conference that rate-related issues would be litigated and further having taken no action before the Commission to seek clarification of the Commission's Order, Star cannot be heard now to claim lack of notice and violation of due process.[16] Having also had an opportunity prior to the hearing to learn the allegations of its adversaries with some degree of specificity regarding its ratemaking practices, to meet evidence presented against Star, and present its own evidence in justification of its ratemaking practices, there can be no violation of due process. *Golden Grain Macaroni Company v. Federal Trade Commission*, 472 F. 2d 882, 885 (9th Cir. 1972), cert. denied 412 U.S. 918 (1973); *Kuhn v. Civil Aeronautics Board*, 183 F. 2d 839 (D.C. Cir. 1950); *L. G. Balfour v. Federal Trade Commission*, 442 F. 2d 1 (7th Cir. 1971); Davis, *Administrative Law Treatise*, sec. 15.14, p. 432.[17]

[16] If Star was concerned over ambiguities in the Commission's Order, the proper course of action was to file a motion with the Commission. As the Commission stated in *Agreement No. 5200-26*, 13 F.M.C. 16, 24 (1969):

> If a party with an interest in an agreement is dissatisfied with the scope of an order of investigation or in doubt as to its scope, the appropriate vehicle for relief is the filing of a timely motion.

It is appreciated that all parties were under peculiar time pressures because of the November 12, 1974, expiration date but Star could have asked the Commission to take this fact into consideration in ruling upon its motion for clarification of the Order.

[17] The latter authority states:

> The cardinal principle of fair hearing is . . . that parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case.

In addition to arguing that consideration of its ratemaking practices violates due process, Star also contends that any evidence pertaining to its rates or ratemaking practices is totally irrelevant on the grounds that the subject agreement has nothing to do with rates or rate-fixing. In the absence of a showing that the agreement itself is the "proximate cause" of Star's decision to charge FAK, per container, or volume rates, Star maintains that an examination of the lawfulness of such rates is not properly within the scope of a section 15 investigation. Star acknowledges that the Commission has investigated particular rates or ratemaking practices in a section 15 proceeding but contends that in such case the agreement concerned was a conference agreement, the very essence of whose authority is rate-fixing. *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441 (1966).

Star's contentions must be rejected, in my opinion, since they attempt to establish a circumscribed function for the Commission totally at variance with the Commission's responsibilities in section 15 matters. In effect, Star is contending that the Commission must either restrict itself to examining the four corners of an agreement, *i.e.*, to its text, or only some shipping activities which flow from the agreement, not all, *i.e.*, those activities which stand in some type of proximate relationship to the terms of the agreement. The Commission, however, has made clear that its function in section 15 matters is to exercise a continuing supervision over the activities of parties to an agreement and the operations of the agreement without qualification. There is no limited supervisory role for the Commission in which the Commission disclaims interest in certain practices of parties to an agreement even if there is evidence that such practices may be detrimental to commerce or otherwise in violation of the Act. The very essence of the Commission's regulatory responsibility under section 15 is to maintain close and constant surveillance over section 15 agreements and their operations to make sure that the authority granted is in no way exercised so as to contravene the public interest or to violate any provision of the Shipping Act. The Commission cannot fully discharge its responsibilities by taking only a partial look at the conduct flowing from an agreement. There are many cases establishing these propositions in addition to *Federal Maritime Commission v. Seatrain Lines, Inc.*, cited above, at p. 735.

In *In Re: Pacific Coast European Conference*, 7 F.M.C. 27 (1961), the Commission described its responsibilities under section 15 as follows:

> The section expressly confers on the Commission the power of disapproval "whether or not previously approved" and thus necessarily imposes a continuing duty upon the Commission to insure that the parties to section 15 agreements are at all times complying with the Act and their approved agreement and that their operations are not

detrimental to the commerce of the United States or contrary to the public interest. This appears from the face of the statute. In addition, the legislative history of section 15 makes plain that Congress granted an antitrust exemption only because it envisioned that the permitted activities would be subjected to constant and effective government control and supervision. 7 F.M.C. at pp. 33, 34.

Section 15 quite clearly demands that we constantly inspect and if necessary regulate the activities of persons subject thereto. 7 F.M.C. at p. 35.

It is manifestly not enough under the language of section 15 that we are apprised merely as to the terms of the respondents' agreement. It is essential also that we know at all times the nature of their activities under the agreement, for how else can we determine whether it is being complied with, and is not being carried out in a way that violates the Act, is detrimental to commerce, or incompatible with the public interest. 7 F.M.C. at p. 35.

In *Agreement No. T–4: Terminal Lease Agreement, Long Beach, California,* 8 F.M.C. 521 (1965), the Commission stated:

In discharging our duties under section 15, we are not limited to those matters parties to agreements wish us to see. We are required to go further. Where agreements are strongly protested, as here, we must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements. 8 F.M.C. at p. 529.

It should be especially noted that the Commission's concern is not so much with the terms of an agreement or the initial approval but the "activities," "operations," "consequences," "objectives," and "results." See also *Agreement No. T–4, etc.*, cited above, at p. 534 ("ramifications," "impact"); *Outbound Rates Affecting Export High-Pressure Boilers*, cited above, at p. 453 ("viable implementations"); *Mediterranean Pools Investigation*, 9 F.M.C. at p. 294 ("probable future impact"); *Oranje Line et al. v. Anchor Line Limited et al.*, 5 F.M.B. at p. 730 ("actual results of operations").

In the instant case the parties to the Star agreement have combined to establish a common carrier joint service by contributing capital and vessels and setting up an organizational apparatus to provide continuing management of the service. Two parties, W-L and Star, are subject to the jurisdiction of section 15 without question, and W-L places two representatives on Star's board which under certain circumstances can have some say in determining ratemaking policies. W-L, moreover, has a type of veto power under the voting procedures established in the agreement. The immediate result of the establishment of a joint service whose purposes are to operate as a common carrier in United States trades is the publication of rates and filing of tariffs. If, in one of the many trades in which Star operates, it is alleged that its rates and ratemaking practices are discriminatory and harmful to the commerce of the United States, it is no answer to claim that the tariff

has nothing to do with the agreement of organization, especially if a Board of Directors consisting of representatives of parties to the agreement has ultimate responsibility and authority over Star's management. If parties band together to operate a joint service in the commerce of the United States they must not only obtain authority from the Commission pursuant to section 15 but must at all time make sure that the activities which are carried out in pursuance of the purposes of the authorized agreement comport with requirements of American law. This is not to say that every activity is equally relevant in determining whether a basic agreement should be disapproved or modified. If a rate-fixing group such as a conference insists upon publishing discriminatory rates (an activity which Star would call "proximately caused" by the agreement itself) it is easy to make a case for disapproval. If a conference publishes only one unlawful rate out of thousands, it is obviously much more difficult to justify outright disapproval of the entire agreement. See *Calcutta, East Coast of India and East Pakistan/U.S.A. Conference v. Federal Maritime Commission*, 399 F. 2d 994 (D.C. Cir. 1968). Similarly, if the Star agreement is not essentially one of concerted multi-carrier ratemaking as in the case of a conference, a showing that some of its ratemaking practices in one of its many tariffs, may be unlawful does not warrant wholesale extinction of the basic agreement. Relatively minor modifications to the authority contained in the agreement designed to correct the specific abuses may be all that is required. If the basic agreement, however, were of a type having no reasonable relationship whatsoever to the activity in question, then evidence of the activity would be totally irrelevant to the question of continued approvability. This could happen, for example, in an agreement among carriers to rationalize sailings when the activity involves rates charged by one of the participating carriers in its tariff. The two activities, rationalization and rate-setting, have no apparent relationship. Contrast this with the present case in which parties establish a vehicle, Star Shipping, whose purpose is to offer a carrier service worldwide, the natural outcome in U.S. trades, at any rate, if such service is common carriage, is to publish tariffs and establish rates. How can it be argued that the agreement is not responsible for or "proximately" related to this activity and that the Commission cannot touch the agreement if this activity is causing some harm to the commerce of the United States, especially under a statute which requires disapproval of any agreement which the Commission finds "to operate to the detriment of the commerce of the United States" or "to be in violation of this Act?" Could Star have argued as cogently against inclusion of so-called "rate issues" in this section 15 proceeding if the allegations had been that in every one

of Star's ten tariffs on file with the Commission, the rates published therein demonstrated a policy of preference, discrimination, or predatory rate-cutting, although the basic Star agreement, of course, says nothing about these things?[18] Would the Commission under those circumstances leave the basic agreement untouched? Yet these are the allegations which are being made against Star in this proceeding, albeit in much smaller measure, since they refer to only one of Star's many tariffs.

In brief, Star's doctrine that "proximate cause" must be shown between an agreement and an allegedly unlawful activity in a section 15 proceeding before evidence of the activity can be considered is inconsistent both with the express language of section 15 and with the Commission's oft-expressed duty of close and constant surveillance over parties operating under approved agreements. The doctrine may have some validity, however, but if so, it is only in terms of how much weight will be given to evidence of a particular activity in determining whether a basic agreement itself should be disapproved or modified.[19]

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[18]Even Star's argument that consideration of particular rates would be proper in a section 15 proceeding only if the agreement under investigation was a rate-fixing agreement, such as a conference, because the agreement is the "proximate cause" of the rates, is not entirely accurate. Conference agreements themselves do not specify nor do they require that the carriers fix any particular level of any rate, they merely authorize the carriers to fix rates in common. Unlike rate-fixing agreements which do in fact fix and specify a particular rate, conference agreements are not the "proximate cause" of any specific rate level, although obviously they stand in a close, logical relationship to the rates fixed. The conference rates ultimately fixed constitute the viable implementation of the conference's authority contained in the basic agreement but so do the Star rates constitute implementation of the authority contained in the basic agreement to set up a joint service and operate as a common carrier in U. S. trades.

[19]Star cites several cases in support of its contentions that the Commission has not permitted rate issues to be admitted into section 15 proceedings or other issues not directly related to the agreement in question at least without notice. In *Agreement 8492-Alaskan Trade*, 7 F.M.C. 511, 516 (1963), *Seas Shipping Co. v. American South African Line, Inc. et al.*, 1 U.S.S.B.B. 568, 583 (1936), and *Atlantic Refining Company v. Ellerman & Bucknell Steamship Co., Ltd.*, 1 U.S.S.B.B. 242, 256, 257 (1932), the Commission did indeed appear to rule out consideration of rate or other issues not directly related to the type of agreement in question. In *Seas Shipping*, however, the report indicated that the agreement did not in fact cause the low rate levels and the rate war involved and if anything helped forestall the rate war through its unanimous voting rule and therefore did not merit disapproval. In *Atlantic Refining Company*, the complaint never alleged section 15 violations and respondents were not put on notice that their agreement might be disapproved under section 15. The report thus did not rule out the possibility that with proper notice to all respondents and to all shippers and ports concerned, evidence of preference and discrimination under sections 14, 16, and 17 of the Act might be relevant to the question of disapproval.

But compare *Contract Routing Restrictions*, 2 U.S.M.C. 220, 226, 227 (1939), *Port Differential Investigation*, 1 U.S.S.B. 61 (1925), and *Outbound Rates Affecting the Exportation of High Pressure Boilers*, 9 F.M.C. 441, 453, 454 (1966). In *Contract Routing*, the Commission specifically went beyond consideration of the agreement concerned and examined peculiar conference dual-rate contracts despite the fact that shipper signatories to the contracts were not involved in the proceeding. The Commission held that the conference agreement itself could be disapproved if the contracts were unlawful without the need for a separate investigation of the contracts. In *Port Differential*, the Commission disapproved an agreement although the complaints concerned had alleged only violations of sections 16, 17, and 18. The Commission had, however, expanded the proceeding and given due notice. In *Boilers*, the Commission held that evidence of rating practices can be considered in section 15 proceedings involving conference agreements and that under section 15 the Commission could act against rates, not just the terms of the agreement. As Star points out, however, conference agreements and rate-fixing are closely related. As discussed above, furthermore, Star has been put on notice that rate issues were involved in this proceeding.

Finally, note the language of the court in *Calcutta, East Coast of India and East Coast of Pakistan/U.S.A. Conference v. F.M.C.*, cited above, where the court strongly implied that conference agreements could be disapproved under some circumstances for reasons unrelated to the type of agreement involved. 399 F. 2d at p. 998.

The Lawfulness of Star's Rates in the Inbound Transpacific Trade

Having found that jurisdiction over the Star agreement lies, that notice of rate issues has been given to Star, and that consideration of such issues is proper, I now come to a consideration of the allegations that Star's rates and ratemaking practices in the inbound transpacific trade are unlawful.

Essentially TPFCJ/K and Sea-Land and to a more limited extent, Hearing Counsel, attack Star's FAK rates, its per container pricing, its volume discounts, its rate level, and its shipper container allowance. It is alleged, although not always clearly so, that these things violate various sections of the Act, either section 14(4), 16, 17, or 18, as well as the standards of section 15. The gravamen of these contentions is that Star's pricing system is preferential to shippers of high-valued, high-rated commodities and unfairly discriminatory against shippers of low-valued, low-rated commodities, is detrimental to commerce and unreasonably low, and furthermore represents predatory competitive pricing. Sea-Land even contends that Star has established unlawful outbound-inbound disparities in its services.

These contentions are comprehensive and serious and deserve the most careful attention for if valid they would show that Star is engaging in multiple violations of law and steps would have to be taken to curtail Star's authority by modifying its basic agreement if Star would not voluntarily correct these practices. Furthermore, as mentioned above, there is no evidence other than that pertaining to these ratemaking practices which remotely suggests that the Star agreement should be disapproved, cancelled, or modified. On the contrary, testimony from shippers/consignees and port representatives unanimously praised Star's services and testified as to the benefits which flowed from those services, although shippers in the inbound transpacific trade did not appear. Furthermore, in view of the strong support of these shippers and port representatives, one of whom (Tacoma, Washington) did appear for a port involved in the inbound transpacific trade, unless the rate-related evidence shows violations, the Star agreement should be approved indefinitely.

A few preliminary observations are necessary in order to establish some basic ground rules for the determination of these rate-related issues.

The first rule to bear in mind is that if the Commission is to disapprove, cancel, or modify an agreement pursuant to section 15 of the Act it "must adduce substantial evidence to support a finding under one of the four standards of section 15. . . ." *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238, 244 (1968). As the Court

stated in *Calcutta, East Coast of India, etc. v. Federal Maritime Commission*, cited above, at p. 997, furthermore, an agency action will not be disturbed by the courts unless "the findings underlying it lack significant support in the record." Consistent with these judicial admonitions, the Commission has held that it will not disapprove an agreement on the basis of "speculative possibilities" or the "bare possibility" that it may violate the Act, or without a "tangible showing" that the agreement is contrary to the public interest. See *Agreement 8492-Alaskan Trade*, cited above, at p. 519; *Outbound Rates Affecting the Exportation of High Pressure Boilers*, cited above, at p. 454; *West Coast Line, Inc. et al. v. Grace Line, Inc. et al.*, 3 F.M.B. 586, 595 (1951).

The Commission, while accepting its burden of adducing evidence, nevertheless has made clear that it expects those parties protesting approval of an agreement to come forward with information in support of the allegations made in their protests. *Agreement No. 9905*, 14 F.M.C. 163, 165 (1970). In cases involving allegations of preference and discrimination, furthermore, the Commission has consistently held that these are questions of fact and in many instances extremely difficult and complicated questions of fact. *Denial of Petition for Rulemaking, Cargo Diversion*, 14 SRR 236, 238 (1973); *Disposition of Container Marine Lines*, 11 F.M.C. 476, 490 (1968); *Isbrandtsen Co., Inc. v. States Marine Corp. of Delaware*, 4 F.M.B. 511, 513 (1954).

In considering the various allegations of petitioners and Hearing Counsel, for the most part, one fact stands out and that is that despite the fact that these allegations rest heavily on contentions that shippers are being harmed or discriminated against, not one shipper or consignee in the inbound transpacific trade appeared to tell his story. Perhaps this was due in some measure to the haste with which this proceeding had to be conducted in view of the expedition mandated in the Commission's Order, but in my opinion the lack of shipper testimony on matters that supposedly affected shippers is a serious deficiency. Instead of shipper testimony the record contains testimony of witnesses representing carriers competing with Star whose interest naturally is that Star's competitive ability be curtailed. Yet it is these witnesses who testified as to how the shippers are being harmed by Star's rates. Significantly in the Commission's mammoth investigation of rate disparities in the North Atlantic/United Kingdom trade, *Investigation of Ocean Rate Structures*, 12 F.M.C. 34 (1965), affirmed sub nom. *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 417 F. 2d 749 (D.C. Cir. 1969), the Commission disapproved only seven rates on the basis of disparities in rate levels and shipper testimony as to specific impediment of movement. The Com-

mission overruled the Examiner who had urged disapproval of hundreds of high rates as to which little or no movement had in fact occurred but as to which there was no shipper testimony. 12 F.M.C. at p. 63; 9 SRR 1007, 1048, 49 (Initial Decision). Evidence based upon a theoretical evaluation of rates or even evidence showing lack of movement under an unexplained high rate, absent tangible evidence of harm presented by shippers, was considered by the Commission inadequate to support findings that any rate was so unreasonably high as to be detrimental to commerce.

With these principles in mind let us examine the evidence to see whether Star's ratemaking system in the aspects set forth above constitutes an "unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered," in violation of section 14 Fourth, makes or gives "any undue or unreasonable preference or advantage to any particular person . . .," in violation of section 16 First, establishes "any rate, fare, or charge which is unjustly discriminatory between shippers . . . ," in violation of section 17, or establishes any rate which is "so unreasonably high or low as to be detrimental to the commerce of the United States," in violation of section 18(b)(5).[20]

The main points of the attack upon Star's rate system are that it discriminates against low-value, low-rated commodity shippers and attracts shippers of high-value, high-rated commodities, such as electronic goods, and gives Star certain advantages over competing carriers. It is also contended that the rates are too low.

Star's rate system in the inbound transpacific trade, as shown in finding no. 51 above, consists very simply of a rate per container for any kind of containerizable cargo with a sliding scale of reductions based upon increased volume. Thus, if one shipper or any number of shippers tenders a 40-foot containerload of commodities, it will be assessed $1,975 by Star. If more than ten but less than 20 containers are tendered, the rate drops to $1,925, finally dropping to $1,725 for 100 containers or over. There is a different scale for

[20]Since petitioners and to a lesser extent, Hearing Counsel, allege violations of law because of certain aspects of Star's rates, the evidence should be evaluated primarily in terms of those substantive sections of the Act invoked by these parties where such evidence is relevant and probative. This is entirely proper since one of the four standards enumerated in section 15 is any "violation of this Act." Star discusses at great length the limitations of Commission authority over rates in foreign commerce, citing the legislative history to Public Law 87–346, which among other things enacted section 18(b)(5), and numerous cases establishing the proposition that the Commission's authority in section 15 matters over rates is no greater than what is granted by the substantive provisions of other sections of the Act such as sections 17 and 18(b)(5). See, *e.g., Iron and Steel Rates Export-Import*, 9 F.M.C. 180, 193 (1965); *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 136–137 (1965). Star's discussion is generally accurate. It cannot be denied that the Commission's authority over rates in foreign commerce is not plenary as it is in the domestic offshore trades under the Intercoastal Shipping Act, 1933. The Commission does, of course, have full power to cancel an agreement approved under section 15 provided the record will support findings that one of the four standards enumerated in section 15 has been violated even if the matter concerns only rates. See *Imposition of Surcharge by the Far East Conference*, cited above, at pp. 136–137, but compare *Calcutta, East Coast of India, etc. v. Federal Maritime Commission*, cited above.

20-foot containers. These are known as FAK (freight-all-kinds) rates.

Petitioners and Hearing Counsel contend that these FAK rates are unlawful in various respects. It is claimed that they shut out low-value, low-rated commodities. FAK rates, however, are well known both in ocean shipping and inland transportation and are not considered to be unlawful *per se*. It is true that they mark a departure from the more conventional tariffs which publish hundreds or thousands of commodity rates which are often subdivided even in commodity categories and further elaborated with minimum and volume requirements. Commodity pricing is supposedly based upon consideration of various ratemaking factors including not only cost but value of service, sometimes referred to loosely as "what the traffic will bear." *Investigation of Ocean Rate Structures*, cited above. It is recognized that this type of tariff structure embodies discrimination among commodities of a completely lawful type, but one in which some commodities are called upon to contribute a greater share to the costs of the carrier than others since some commodities cannot bear a higher rate and still move.[21] FAK rates, on the other hand, are based on cost of service and do not discriminate among commodities on value of service or "what the traffic will bear" considerations. This fact does not thereby render them unlawful, even under the more stringent rate regulation imposed by the Interstate Commerce Act. In *Freight All Kinds, Official Territory*, I.C.C. Docket No. 35435, Decision of Bamford, ALJ, May 11, 1973, adopted January 22, 1974, it was stated:

> The requirement of just and reasonable classifications for rate-making purposes, developed by consideration of some or all of the 15 factors is consistent with the purpose of the Act to protect shippers from arbitrary carrier pricing. . . . Classification is a form of lawful discrimination. A requirement of reasonable classification of property for the purpose of transportation pricing, to insure that various commodities of like characteristics are not unlawfully discriminated against, does not necessarily imply either a need or requirement that class separation or individual class pricing must always be used. *No discrimination or competitive disadvantage to shippers has been shown to result from carrying all commodities at the same rates. It cannot be held that Section 1(6) bars a carrier from providing shippers with a newly developed service and a simplified method of pricing which does not prejudice or prefer them or other shippers.* Mimeo opinion, p. 3. (Underscoring added for emphasis, footnote omitted.)

Although attacked by Sea-Land and the TPFCJ/K, Sea-Land itself publishes FAK rates in domestic trades side by side with commodity rates as do other domestic ocean carriers and the record further indicates that FAK rates exist in other world trades without having driven out commodity rates in those trades.

An analagous rate to the FAK rate with which this Commission is

[21] See *Freight All Kinds, Official Territory*, I.C.C. Docket No. 35435, Bamford, ALJ, Opinion, May 11, 1974, adopted by the Commission, January 22, 1974, p. 5.

familiar is the cargo NOS rate. Like the FAK rate, the NOS rate may apply against any kind of cargo unless in a particular tariff the cargo enjoys a specific commodity rate. A general cargo NOS rate is usually set without regard to recognized ratemaking factors such as cost of service, value of service, or competition, and is usually set at a rather high level. This enables conferences of carriers to file a lower commodity rate when requested by a shipper without waiting the usual 30-days' period which applies to rate increases, pursuant to section 18(b)(2) of the Act. Despite the fact that the rate disregards recognized ratemaking factors and is artificially high, it has not been found to be unlawful or detrimental to commerce absent testimony by shipper or conference witnesses that it has in fact, not in theory, inhibited the movement of specific, identified commodities because of the high level and has further inhibited shippers from requesting lower commodity rates. See *Investigation of Ocean Rate Structures*, cited above, at pp. 45, 46, 63, 64. Contrast that situation with the present case where there was no evidence that Star's FAK rates inhibited shippers from requesting different rates nor testimony of shippers or conference witnesses that in any particular instances the high FAK rates had actually precluded movement of a particular commodity. Rather there is theoretical testimony to the effect that the FAK rate is too high for some commodities that cannot stow many tons into a container or have low value, although there is also testimony that the FAK rates are too low!

The above discussion points out the deficiencies in the contentions of petitioners and Hearing Counsel regarding discrimination among shippers and detriment to commerce. If shippers of low-valued, low-rated commodities are being shut out, who are they and where are they? If there is an "unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered," where is this contract or this arrangement with the shipper offering volume? If Star is giving an "undue advantage" to "any particular person" or subjecting "any particular person . . . or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," in violation of section 16 First, who is this particular shipper and what is this "description of traffic." Again instead of shippers appearing and testifying, the record contains testimony that "low-valued, low-rated" commodities are suffering prejudice because of Star's FAK rates. True, Star's carryings, according to the record, are in extremely high percentages those of electronic goods, and Star did not carry the wide variety of items carried by Sea-Land, including motorcycles, auto parts, and porcelainware which are lower-rated commodities listed by the TPFCJ/K and Sea-Land as major movers. But were shippers of

these items turned away by Star? Were they signatories to the TPFCJ/K's exclusive patronage contract which became effective on October 1, 1973? Did shippers of these items prefer a containerized service including stuffing and stripping at container freight stations or Sea-Land's faster service rather than Star's limited containeryard service? Did they also choose one of the 11 other nonconference carriers operating in the trade? All these questions are unanswered. Yet petitioners and Hearing Counsel seek findings that Star has violated the law and has discriminated against and shut out movement of commodities such as these because one, it has not carried them, and two, there may be shippers of commodities who may not be able to stuff an entire container with enough units of the commodities involved to make the per container-load FAK rate economical.

In considering whether Star is unjustly discriminating and engaging in predatory, "cream skimming" practices, the following facts of record should be kept in mind tending to offset such allegations. First, no evidence was presented showing that an actual shipper had asked Star for and been denied lower rates than the FAK rate. In fact, Star's West Coast agent testified that he knew of no such request or denial and this testimony is unrefuted. Second, Star does publish commodity rates in a separate non-containerized section of its tariff (FMC No. 7, at p. 29). Third, the record shows that Star does advertise in trade journals on a modest scale. This is no indication that Star is trying to shut out any particular shipper or commodity. Fourth, in that period of 1974 shown in the record, 50 percent of Star's containerized service was utilized by one NVOCC. Although the record does not indicate which NVOCC was involved or what his tariff provides, NVOCC's generally provide consolidation services for less than containerload shippers, in which case Star's limited containeryard service would in effect be expanded. Fifth, Star is operating in competition with 16 conference carriers and 11 other nonconference carriers. The former carriers have the benefit of the conference's exclusive patronage contract with shippers, effective since October 1, 1973. Since Star has been operating only since mid-1972 in the inbound transpacific trade, this may help explain why its service has been used by small numbers of shippers (57 in 1973) and why its utilization of capacity in 1973 has been only 22 percent. Sixth, although Star carries a disproportionately high amount of electronic goods compared to its other carryings, other nonconference carriers such as Tokai, Seatrain, OOCL, and FESCO are also important carriers of such goods. The record shows furthermore that large numbers of shippers of such goods are not conference contract signatories (about 50 percent). These goods thus provide a fertile market for nonconference lines. Seventh, the concept of "low-

rated, low-value" commodities which Star's FAK rates are allegedly excluding is a concept having meaning only in relation to commodity-rate tariffs which distinguish among commodities by assigning different rate levels in consideration of various factors, one of which may be value of the commodity. Star's FAK rates treat all commodities alike. Although in theory a less-than-containerload shipper who cannot fill a container or whose cargo has low value may find a single FAK rate uneconomical, no such shipper testified on this record and no showing was made, as mentioned above, that such shipper was denied a special rate by Star or that the fact that Sea-Land carried a wide variety of items means that they could not move under the Star tariff or via an NVOCC using Star's underlying service. Finally, there is some indication of record that Star's FAK rates converted to an effective per unit rate is actually lower than the effective rates charged by Sea-Land on a wide variety of commodities carried by Sea-Land, although it is contended that Star's FAK rate is shutting out such commodities. In a study of two sailings of Sea-Land's SL7s in which Sea-Land carried everything from artificial flowers to zippers, it was shown that Sea-Land's average revenue per revenue ton was $63.40 with the lowest figure at $42.04 for "hand tools." (Ex. 50, Appendix 1). Yet according to Sea-Land's own exhibit, which purports to show that Star's effective per unit rates are too low, Star's rates range from $36.70 to $42.02 per revenue ton, assuming a stowage factor of 47 revenue tons. (Ex. 50, Appendix 2). If Star's effective rates are really that low, then they should not be shutting out these various commodities actually carried by Sea-Land at higher effective rates.[22]

To conclude, I find insufficient support in the record for a finding that Star's FAK rates (disregarding for the moment their volume discount features) are unlawful or in fact have unjustly discriminated against particular shippers or commodities. There is altogether too much argument and theorizing and not enough tangible evidence of specific harm and detriment to actual, rather than hypothetical shippers.

In addition to the contentions that Star's FAK rates are unlawful in principle is the contention that Star's volume discounts are also unlawful on the grounds that they are unjustified. Hearing Counsel, for instance, while not contending that FAK rates in principle are unlaw-

[22]Of course this assumes that the commodities would stow at 47 measurement tons in a Star 40-foot container and that they are free to move via Star rather than under the conference's exclusive patronage contract. In another exhibit cited by Hearing Counsel covering a different period of time, a slightly different picture emerges. In this exhibit (Ex. 63, Appendix 1) Sea-Land lists its ten leading commodities, their stowage factors and revenues per 35-foot box. The exhibit shows that in some instances the commodities would not stow 47 measurement tons converted to a 40-foot container and in several other instances the revenue per box converted to 40-foot container was below that of Star.

ful, although contending that Star should be ordered to "modify" them so that they would attract more commodities, contend that the volume incentive features of the FAK rates, *i.e.*, the reductions in the rate as more containers are tendered to Star, violate section 14 Fourth of the Act. Hearing Counsel do not contend that volume discounts are unlawful in general, only that Star's are unlawful because they are not related to cost savings or other transportation factors which are altered by volume of freight offered, citing *In the Matter of Carriage of Military Cargo,* 10 F.M.C. 69, 73 (1966), affirmed *American Export-Isbrandtsen Lines v. Federal Maritime Commission,* 380 F. 2d 609 (D.C. Cir. 1967) and *Puerto Rican Rates,* 2 U.S.M.C. 117, 121–2 (1939). Since the discounts are in $50 increments for 40-foot containers, Hearing Counsel contend that "it cannot be shown that Star realizes a savings of $50 per container when it receives ten forty-foot containers from a shipper rather than nine." Hearing Counsel admit that there may be some administrative savings in volume shipments because of less documentation but state that "we cannot imagine that these savings would amount to $50 per container."

No case cited to me either before this Commission or the Interstate Commerce Commission establishes the proposition that volume incentive rates, volume discounts, or volume minima are unlawful *per se.* In fact, as the record shows, volume rates are used to a considerable extent both by ocean carriers and inland carriers. They are found throughout the tariff of the TPFCJ/K, for instance, as well as the tariffs of nonconference carriers such as FESCO, Tokai and Seatrain, and in tariffs of motor and rail carriers regulated by the I.C.C. In some instances, volume rates have been published in TPFCJ/K's tariff at the request of a particular shipper. Members of the TPFCJ/K, furthermore, who publish joint intermodal minibridge tariffs in conjunction with rail carriers, have themselves negotiated payments to these carriers in the form of divisions of revenue which have volume discounts built into them.[23] In such cases, as Star points out, the savings to the ocean carrier who tenders greater volumes are not passed on to the shipper, whereas any shipper who uses the volume discount features of Star's tariff enjoys the benefit of a cost reduction.

Star justifies its use of volume discount rates on several grounds. It cites competition, especially with nonconference operators like Seatrain and Tokai who also publish volume discount rates. It cites its service disabilities referring to the fact that Star offers a limited containeryard service which does not include stuffing and stripping and

[23]In the Sea-Land minibridge tariff, previously effective, Eastbound to Atlantic Coast, for example, the rail division of revenue paid by Sea-Land to the rail carrier drops from $799 to $739 to $677 to $618 corresponding to increasing volume of containers tendered in increments of 20. (10th Revised page 118, Freight Tariff No. 196).

additionally cannot meet the speed of vessels employed by a carrier such as Sea-Land. It contends that the discount is necessary to attract enough base cargo to make vessel calls economical and thus offer an inbound container service by spreading costs over a greater number of containers. The volume discounts furthermore, according to Star, encourage NVOCC's to utilize Star's service, thus fostering this type of business and "discouraging monopolistic horizontal expansion." These NVOCC's, it is argued, in turn serve small shippers by offering consolidation services to less-than-containerload shipments. Star does not rely upon cost savings as justification although, as Hearing Counsel acknowledge, some administrative cost savings may result from increased handling of a greater number of containers. These factors are not refuted by cross-examination or contrary evidence. Rather I am asked to discount them as justifications and to find Star's volume discounts unlawful because they are not correlated to cost savings.

While cost savings are certainly considered to be justification for volume discount rates, they are not the only recognized factor. Furthermore, before a violation of law can be found under sections 14 Fourth or 16 First, the record must establish with substantial evidence that there has in fact been undue or unreasonable preference or prejudice or unjust discrimination with respect to "any particular person, . . . or description of traffic" or to "any shipper." The critical words involved are "undue," "unreasonable" and "unjust." [24]

The cases cited to me and others that I have consulted in cases involving the cited sections of law have usually required a showing that a carrier has given special preference to one particular shipper by setting a volume minimum so high that only that shipper can qualify for the reduced rate, or else the spread in the rates is so excessive and inhibitory toward movement of traffic that a great deal of justification is required. See, *e.g.*, *Intercoastal Rates of American-Hawaiian S.S. Co.*, 1 U.S.S.B.B. 349, 351 (1934); *Puerto Rican Rates*, 2 U.S.M.C. 117, 121 (1939); *Agreements 6210, et al.*, 2 U.S.M.C. 166, 170 (1939); *U. S. Atlantic & Gulf-P.R. Conf. v. Am. Union Transport*, 5 F.M.B. 171, 172–73, 76 (1956); *Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co.*, 7 F.M.C. 611, 617 (1963).

There is absolutely no evidence on this record that Star's volume

[24]Star contends that the record fails to show any "contracts" with shippers in accordance with the language of section 14 Fourth and therefore there can be no violation of this law. Hearing Counsel dispute this contention, stating that the Commission has considered violations of this law without regard to special contracts and that any contract of affreightment would suffice. While no case has specifically decided this issue, it really is somewhat academic since section 14 Fourth and section 16 First are usually jointly involved, as they are here, and the thrust of both of them is against unjust discrimination or unreasonable prejudice, etc., whether or not there are special contracts involved. Furthermore, section 14 Fourth continues beyond the language referring to discriminatory contracts and prohibits unfair treatment or unjust discrimination in the matter of cargo space accommodation without regard to special contracts.

discount rates were set with any particular shipper in mind or at such high minima that they can be used by only one or a few shippers at best. On the contrary, the record indicates that every category of Star's rate structure is utilized. Indeed, Category IV, which covers tenders of between 50 and 100 containers, was used most often in 1973. (See Findings above, paragraph 53.) There is no evidence that any specific commodity was prevented in actual fact from moving because of Star's volume rate structure. As noted above, there is no evidence that any shipper requested and was denied a specific rate and the mere fact that many commodities moved via Sea-Land or TPFCJ/K rather than Star can as well be explained by many reasons other than the reason that Star has, in fact, shut them out. Nor are the rate discounts so excessive as to give the appearance of undue or unreasonable preference. On a *per container* basis the rate reductions range from only 2.5 percent between categories I and II in Star's tariff (1–9 containers vis-a-vis 10–29) and 10 percent between category I and category V (100 containers or over).[25] Contrast this with the spread involved in *Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co.*, cited above, at p. 617, which in one case was approximately 80 percent and in the other, approximately 50 percent.

The *Puget Sound Tug & Barge Co.* case, cited above, is informative. In that case, as noted, the rate spread was excessive on its face (in one instance the non-volume rate was five times and in the other twice the volume rate). Both the Commission and the Examiner noted that there was only one shipper (of cement) involved and that there was a possibility both that other shippers might appear and that the excessively high spread was keeping them out. 7 F.M.C. at p. 617; 2 SRR at p. 223. There was, furthermore, no evidence produced by the carrier to justify the rates. 2 SRR at p. 223. Both the Commission and the Examiner found that the excessive spread itself was prima facie discriminatory. 7 F.M.C. at p. 617. Despite all this, the Commission refused to find the volume rates to be in violation of section 14 Fourth or 16 First of the Act. Instead, the Commission granted respondents an opportunity to petition for a limited reopening of the proceeding for the purpose of submitting evidence in justification. 7 F.M.C. at p. 617. It should be noted that in the instant case Star's rate spread is much smaller (2.5 to 10 percent), there is no evidence that one shipper is involved or that any specified shipper has not been able to use the volume rate features or that the high level of the rates has actually prevented any commodity from moving. On the contrary, if anything,

[25]The reduction in rates is from $1,975 to $1,925 between categories I and II, or 2.5 percent. The reduction between categories I and V (*i.e.*, when over 100 containers is tendered compared to only nine containers or less) is $1,975 to $1,725 or 10 percent.

the volume features of Star's rates appear to be attracting shippers. Also, Star's rates are FAK, *i.e.*, apply to any commodity, and do not give preference to any particular shipper of any specified commodity. Moreover, Star has produced testimony as to the reasons for its volume discounts, although petitioners and Hearing Counsel contend that the reasons do not constitute valid justification since they are not cost related. At the least, it seems to me, the *Puget Sound* case establishes that a party alleging violations of section 14 Fourth or 16 First of the Act should first show an excessive rate spread and make some showing that the excessively high level applicable to smaller volume shipments has in fact inhibited movement of a commodity or prejudiced an identified shipper. If so, the carrier then should provide justification. In the present case, however, these prerequisite showings have not been made and, as I have noted previously, no shipper has either testified or been identified as suffering prejudice because of Star's rates. In this connection it is well to bear in mind the words of the Supreme Court in *Texas v. Pacific Ry. Co. v. I.C.C.*, 162 U.S. 197, 239, cited by this Commission in *Agreement-Gulf/Mediterranean Ports Conference*, 8 F.M.C. 703, 710, footnote 5 (1964):

> The mere fact that the disparity between the [rates] was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination—much less did it justify the court in finding the entire difference between the two rates was undue or unreasonable, *especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.* (Emphasis is that of the Commission's.)

Hearing Counsel as well as petitioners contend that Star's volume discount rates are unjustified by relation to cost savings or other factors "which are altered with the volume of freight offered." Hearing Counsel cite *In the Matter of Carriage of Military Cargo*, cited above, and *Puerto Rican Rates*, cited above. In the latter case, however, the carrier involved offered no evidence whatsoever to justify its volume rate reduction, which, incidentally, amounted to some 30 percent. 2 U.S.M.C. at p. 121. In the former case, which is cited also by Star in support of its own contentions that special volume contracts must first be shown before there can be a violation of section 14 Fourth, the Commission specifically avoided decision on issues arising under section 14 Fourth and 16 First on the grounds that they were "premature." The case actually held that the competitive bidding system and contractual commitments in connection with carriage of military cargo were not dual-rate contracts under section 14b of the Act and were furthermore not violative of another portion of section 16 referring to an "unjust device or means" to obtain transportation at less than regular rates or charges. As far as unjust discrimination and

undue or unreasonable prejudice are concerned, the Commission offered some *dicta* emphasizing that all contracts based upon volume of freight are not unlawful, only those which are "unfair or unjustly discriminatory." [26] Similarly, under section 16 First, "not all preferences or prejudices are outlawed by that section but only those which are undue or unreasonable." 10 F.M.C. at p. 73.

Hearing Counsel rely upon the following remarks by the Commission:

> But how is such a contract to be unfair or unjustly discriminatory? Obviously, if the advantages offered under it are not based upon transportation factors which are altered by the "volume of freight offered." 10 F.M.C. at p. 73.

There is no explanation whatsoever as to what these "transportation factors" are supposed to be. Nevertheless petitioner and Hearing Counsel reject all of the factors which Star offers in justification such as competition, need to spread the costs of port calls, and the encouragement of the NVOCC business, and urge reliance solely on cost factors.

At least one factor which Star offers which does depend upon volume of freight offered is reduction of expenses which result if Star can attract a greater volume of containers at any particular Japanese port on a per unit basis. There was unrefuted testimony by Star's economic witness that the added variable costs of calling at a particular port could be reduced on a per container basis if Star could attract greater numbers of containers at the port. This might seem like a truism but it is a type of cost savings and the testimony was neither refuted nor discredited by cross-examination.

But is cost the only factor which can be considered as justification and when considered, must the rate be exactly matched with costs in a case involving questions of undue discrimination or unreasonable preference rather than reasonableness of rates under the standards set forth in actual ratemaking statutes such as the Intercoastal Shipping Act, 1933, or relevant portions of the Interstate Commerce Act?

Competition is certainly a recognized ratemaking factor. In *Agreement-Gulf/Mediterranean Ports Conference*, cited above, the Commission found no violation of sections 14 Fourth or 16 First in an amendment to a conference agreement which would have enabled

[26] The Commission also went on to say:

> Not even the most strained reading of section 14 Fourth can render unlawful the mere pro forma solicitation by a shipper, no matter how large, of contracts based upon volume of freight and this is how petitioners would have us read the section. 10 F.M.C. at p. 73.

Yet in the instant case petitioners and Hearing Counsel contend that section 14 Fourth has been violated by Star because Star solicits in its tariff greater volumes of containers not by reference to any particular shipper and they contend violations primarily because the rate reductions are not closely matched with cost savings regardless of any other factors.

conference members to charter full shiploads at reduced rates. The justification was inter-carrier competition, specifically with tramp operators. 8 F.M.C. at pp. 709–10. The Commission emphasized the right of a carrier to compete for traffic in considering whether there is an undue preference or advantage as well as the need to show that there is a "disfavored shipper" who "suffers injury by reason of the discrimination, and that this injury will cease if the discrimination is removed. . . ." 8 F.M.C. at p. 709. The Commission also noted the possibility that a shipper of less-than-shipload cargoes would be paying higher rates than his competitor shipping his goods at full shipload rates via the same carrier but this fact alone did not establish a violation of law. 8 F.M.C. at p. 709.

Interestingly, the Interstate Commerce Commission, which has had a long history of dealing with volume incentive, volume discount, and volume minima rates, after an early history which seemed to rely upon costs as the only permissible justifying factor, has abandoned exclusive reliance on cost factors as justification. Some of this history is discussed in *Eastern Central Motor Carriers Ass'n v. United States,* 321 U.S. 194 (1944), in which the Supreme Court remanded a proceeding to the I.C.C. because of a deficient report with the suggestion that a carrier might be able to justify such rates because of competition with a different mode of carrier and that the I.C.C. ought to abandon exclusive reliance on cost factors. 321 U.S. at p. 207. Since that time the I.C.C. has broadened its considerations beyond costs and intermodal competition and has accepted other factors in justification such as other competition, transportation conditions, the need to improve equipment utilization and to foster movement. See, *e.g., Grain by Rent-a-Train,* 335 I.C.C. 111, 115, 116, 119, 120, 125 (1969); *Coal to N.Y. Harbor Area,* 311 I.C.C. 355, 366 (1960); *Twine from South to the Midwest,* 298 I.C.C. 3, 9 (1956); *Iron or Steel, Minimum 80,000 Pounds from Chicago District,* 54 M.C.C. 413, 417 (1952).

In view of the case law discussed above, I see no reason to insist upon only one type of justification for Star's volume rate structure, to wit, cost savings, as petitioners and Hearing Counsel urge, especially since the factors offered by Star in justification have not been refuted either by contrary evidence or discredited by cross-examination. I therefore find that because of Star's inherent disadvantages in competing with a great number of carriers many of which offer more complete containerized services, because of the need to attract cargo so as to reduce per call costs on a unit basis and to assist in establishing an eastbound container service, in the interest of encouraging another type of transportation business, the NVOCC, and because of administrative cost savings, albeit limited, Star has offered sufficient justification. Further-

more, since this is not a "rate case" in the sense of proceedings under the Intercoastal Shipping Act, 1933, but rather a case involving questions of undue or unjust discrimination or prejudice, etc., precise fixing of rates by matching them with costs or other factors is not required especially in the total absence of testimony from shippers or consignees in the inbound transpacific trade as to harm which they are supposedly suffering from such discrimination. *Agreement—Gulf/Mediterranean Ports Conference,* cited above.

Miscellaneous Issues—Star's Rate Level, Container Allowance, Alleged Transshipments Agreements, and Disparities

Petitioners but not Hearing Counsel make additional contentions regarding certain aspects of Star's operations. It is alleged that Star's rates are unreasonably low, that Star's allowance to shippers tendering their own containers is excessive, that there are transshipment agreements which Star has failed to file as required by section 15 of the Act and that Star is discriminating against U. S. exporters by maintaining rate disparities. None of these contentions is supported by the record, either because of lack of substantial evidence or because there is evidence refuting them. Significantly Hearing Counsel do not support petitioners on any of these allegations.

As to Sea-Land's contentions that Star's rates are unreasonably low, the record indicates that even though the inbound transpacific leg of Star's service is considered by Star to be back haul, Star's rates, both containerized and breakbulk, more than met fully distributed costs in 1973. This is shown in confidential exhibit C-7 and by sworn testimony of Star's witness Meland (Confidential transcript, 48, July 19, 1974). Even if Star's breakbulk revenues earned on the eastbound leg are removed from consideration, furthermore, the record shows that Star almost meets fully distributed costs (Confidential exhibit 2). Even if the Commission decision in *Investigation of Rates-Hong Kong United States Atlantic and Gulf Trade,* 11 F.M.C. 168 (1967), which only required that rate levels meet "out-of-pocket" costs is to be discarded for one reason or another, or the well-recognized doctrine followed in *Matson Navigation Company-General Increase in Rates in the U.S. Pacific Hawaiian Trade,* 16 F.M.C. 96, 102–103 (1973), namely, that on a back haul rates may fall below fully distributed costs for competitive reasons is also to be ignored, the record shows that Star's revenues on its eastbound leg have met fully distributed costs.[27]

[27]Sea-Land contends that inquiry should have been made into 1974 which Sea-Land alleges would have shown that Star could not have been meeting fully distributed costs. Considerable time and effort was expended to allow Sea-Land to put in evidence regarding Star's rate levels and to allow Star to rebut the charges with confidential financial exhibits derived from records in Norway pertaining to the year 1973. Sea-Land desired to explore the year

Petitioners' contention that Star's allowance of $400 per 40-foot container if it is the shipper's rather than the carrier's container is unlawful similarly finds no support in the record. On the contrary, the record refutes the contention. It is alleged that the discount is excessive and prefers big shippers owning their own containers. But the allowance was shown to be related to cost savings realized by Star in the amount of $420.[28] If anything, Star is to be commended for passing on these savings almost entirely to the ratepayer. There is, furthermore, no evidence whatsoever that only "big shippers" can take advantage of the allowance which is open to any shipper who owns or leases containers.

Petitioners' contention that Star has failed to file transshipment agreements as required by section 15 of the Act is not supported by substantial evidence of record. The evidence shows that arrangement for 35 containers handled by Star in 1973 from Korea were made on an *ad hoc* basis with whichever carrier could provide space to Star. Outbound on a few occasions shipments via Star were oncarried from Japan by other ocean carriers for carriage to Thailand, the Philippines, Taiwan or to another Far Eastern port. Assuming that these matters are relevant to the question of approvability of Star's basic agreement, the record simply does not establish whether these arrangements are more than occasional occurrences rather than repetitive, through-movement patterns established by agreement with other carriers, as in *Transshipment Agreement, Indonesia/United States,* 10 F.M.C. 183 (1966), and *Restrictions on Transshipments at Canal Zone,* 2 U.S.M.C. 675 (1942).

Finally, Sea-Land raises a contention that Star is discriminating against U. S. exporters by maintaining disparate rates in its outbound/inbound service and that Star in its more limited service pattern outbound has "virtually embargoed similar commodities in the outbound trade." There is no support in law or fact for these contentions. In fact, the record shows that Star's outbound containerized rates are lower than its inbound FAK rates. For example, Star publishes an outbound

1974 in the belief that increased costs of fuel would have changed Star's 1973 picture. Its proposed exhibit, however, which was excluded from evidence, contained a serious arithmetic error and would have shown, even under Sea-Land's estimates, that Star's rates in 1974 would have made a contribution to administrative and general expenses over and above costs of vessel operating and fuel costs. The record also contains testimony that fuel costs affected different carriers differently. Star also made a counter offer of proof to show that Sea-Land had, among other things, underestimated Star's revenues for 1974. Under all these circumstances it was my opinion that further exploration on what is at best a peripheral issue would be unwarranted and unduly time consuming. If Sea-Land or any other party wishes to litigate the matter of Star's future rate levels and argue about the proper standards that should apply in section 18(b)(3) proceedings, it would be far more proper to file a complaint or petition for an investigation which would frame such issues.

[28] TPFCJ/K disputes the $420 figure, contending that an earlier exhibit shows different costs. But that earlier exhibit (26) related to the previous year 1973 when Star's allowance was $250 and consisted only of direct payments to leasing companies, excluding other costs occurring in 1974.

Cargo NOS rate, the highest per container rate in its service to Japan, in the amount of $950. (Star's Westbound Freight Tariff No. 1, FMC No. 5, 9th Rev. Page 11-B). The lowest inbound FAK rate (for 100 containers or over) is $1,725. Even in a case where the issue of disparities is central to the proceeding, and it has been shown that an outbound rate is higher than a corresponding inbound rate, this alone is not enough to establish a violation but it must also be shown that the higher rate has in actual fact impeded movement. See, *e.g., Investigation of Ocean Rate Structures,* cited above; *Iron and Steel Rates, Export-Import,* 9 F.M.C. 180, 191–92 (1965).[29] Nor is there anything approaching substantial evidence showing that Star's outbound service pattern, which is especially well suited for exportation of forestry products, is unlawfully embargoing anybody's cargo. No shipper testified that this was happening. On the contrary, the shippers who did testify regardless of trade area praised Star for its willingness to accommodate their needs.

Is Star a Predatory Rate-Cutter and Law Violator or Merely an Efficient, Hard Competitor?

Petitioners argue vigorously that Star, at least in the inbound transpacific trade, is a rate-cutter and "cream skimmer" engaging in a predatory type of competition. TPFCJ/K urges disapproval of so much of Star's basic agreement as would permit it to operate in the trade or else impose certain conditions on its operations. Sea-Land does not urge disapproval but also urges imposition of a number of detailed conditions upon Star's operations. Hearing Counsel urge approval of the entire agreement but ask the Commission to order Star to correct certain aspects of its tariff so as to broaden its appeal to shippers and to eliminate excessive volume discounts. Hearing Counsel do not agree with either TPFCJ/K or Sea-Land that Star is soliciting only large shippers, that its rates are too low, that Star has had more than a "minimal impact" on the members of the TPFCJ/K, nor with other contentions discussed above.

The conditions which petitioners wish to impose upon Star are based upon their contentions that Star has violated the law in the respects discussed above and also in their belief that Star is a rate-cutting "cream skimmer" whose activities in the inbound transpacific

[29] In the cited cases the Commission limited itself to consideration of disapproval of certain rates. Sea-Land is urging, however, that the Commission require Star to maintain equivalent outbound and inbound rates and service patterns as well. This request goes well beyond any authority the Commission has announced in the cited cases and seems as well to contravene the Commission's expressions regarding its authority in *San Diego Harbor Comm'n v. Matson Navigation Co.*, 7 F.M.C. 394, 400 (1962), and cases cited therein. See also *Intermodal Service to Portland,* 14 SRR 127 (1973).

trade are having adverse competitive effects on their operations. As seen above, however, there is no substantial evidence that Star's practices are violative of law. These conditions, furthermore, are pervasive. They include such things as requirements that Star publish commodity rates with restrictive rules regarding cargo mix allowed in containers, that Star equalize rates and services outbound and inbound, adjust its volume discounts to match cost savings and its rate structure so as to return fully distributed costs. Star would also be required to establish a method for considering shipper requests and complaints as to low value and light moving commodities, although Star is not a conference agreement which by law must establish such a procedure, and the record shows no evidence whatsoever that Star has turned down any shipper's request for a different rate. Also Star would be required to file annual reports with the Commission showing operating results and financial plans and such reports would be made available to Star's competitors "only for purposes of reviewing whether Star is complying with the terms and conditions of approval set out herein." Although Sea-Land has stated that it is not urging disapproval of Star's agreement and is exercising restraint in its recommendations, these conditions are unprecedented in their scope especially in a proceeding which arises under section 15 rather than domestic rate regulatory laws. The last proposal regarding access to Star's reports by competitors so that they can make sure that Star is complying with the Commission's order is, furthermore, somewhat astonishing since it presumes that the Commission's staff is unable to police compliance and needs the help of Star's competitors to carry out its responsibilities.

Both the TPFCJ/K and Sea-Land go to some pains to cite facts showing that Star is not merely a tiny competitor compared to the average conference member. Although as noted above (Finding No. 41) Star's carryings compared to the TPFCJ/K as a whole are tiny, and in all of 1973 Star carried only 1,858 containers, or less than the capacity of two of Sea-Land's SL7s in terms of comparison with the average conference member and in terms of volume of electronic goods carried (80,000 revenue tons estimated for 1973) Star is not a negligible competitor. The record further indicates that for electronic goods, Star probably carried more than any conference carrier outside of Sea-Land. But there is substantial nonconference competition besides Star, *e.g.*, Tokai, FESCO, OOCL, Seatrain, who carry electronic goods since many shippers of such goods are not conference contract signatories. Indeed, Sea-Land's witnesses candidly testified that it was the FESCO rate reduction on electronic goods which caused the conference rate to decline and that even if Star were to vanish from the

trade it could not be established that electronic goods would move via Sea-Land rather than via other nonconference lines. In 1973, furthermore, Star attracted only 57 shippers despite testimony that there were several thousand shippers in the trade who were not conference contract signatories and about 4,000 who were signatories.

All of this controversy over how large Star is does not really determine the issues in this proceeding regarding Star's conformance with applicable standards of law.[30] All things considered, it appears that Star is an efficient operator who is furnishing an alternative service on a more limited containeryard basis and is doing so by using a modern theory of pricing containerized services, namely, FAK, without resulting in noncompensatory revenues. Having some success in this endeavor with regard especially to carriage of electronic goods, Star has been characterized as a "cream skimmer" and law violator. The record fails to support the latter charge and the former is merely a pejorative characterization.

As a final observation, I think it would be well to bear in mind certain admonitions of the Courts and this Commission to the effect that carriers have a right to compete, that hard competition is not necessarily unlawful, and that regulatory agencies need not bind themselves rigidly to unflexible standards of the past. Thus, even in a case arising under the Interstate Commerce Act which contains a specific policy of protection to competing modes of carriage, the Supreme Court refused to find that a carrier was engaging in unfair or destructive competitive practices merely because the carrier set its rates at a lower level and succeeded in diverting some traffic. In *Interstate Commerce Commission v. New York, N.H. & H.R. Co.*, 372 U.S. 744, 759 (1963), the Court stated:

> Congress did not regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice *simply* because that rate would divert some or all of the traffic from a competing mode. . . . If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. . . . Section 15a(3), in other words, made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. . . .

[30]TPFCJ/K seems to feel, moreover, that evidence of the conference's utilization is highly relevant to the question whether Star is violating the law. TPFCJ/K objects to my ruling which excluded an exhibit purporting to show a precise figure of average conference utilization in 1973. This evidence, which was made the subject of an offer of proof under Rule 10(1), was excluded not because it was hearsay, as TPFCJ/K seems to think, but because, in my opinion, it is not sufficiently reliable to show any precise figure of utilization, being based upon double hearsay and unexplained "budgeting" of figures by 15 different members. Since all parties concede the trade to be overtonnaged and the record already contains evidence showing that Star's per vessel tonnage places it near the top rank compared to conference members (Ex. 48), excluding the members of the Japanese space charter agreements, further exploration of the matter in an expedited proceeding such as this would not be justified. In any event the matter of overtonnaging in the trade has been placed in issue in another proceeding, Docket No. 74-17, *Agreement No. 10116*, Order served October 22, 1974, p. 3.

In *Agreement-Gulf-Mediterranean Ports Conference*, cited above, at p. 709, this Commission cited the Supreme Court in *Texas & Pacific Ry. v. I.C.C.*, 162 U.S. 197, stating:

> It is also a cardinal principle that a common carrier may compete for traffic; that the fact of such competition must be considered in determining whether there is undue preference or disadvantage. . . .

In *Disposition of Container Marine Lines*, 11 F.M.C. 476, 489 (1968), the Commission emphasized the need for regulatory agencies to keep abreast of new developments and adjust rules and regulations to changing times. In *In the Matter of the Carriage of Military Cargo*, cited above, at p. 76, the Commission also emphasized that the Shipping Act is designed to protect the interests not just of competing carriers but of "shippers and 'other persons' subject to its provisions." The Commission went on to say:

> Just as we must "scrupulously insure that all carriers, regardless of flag, are accorded equal treatment under the laws we administer"; we must be equally scrupulous lest our concern for our merchant marine lead us to a construction of the act which dilutes the protection afforded by it to shippers and "other persons." For, under the act, such persons as shippers, forwarders, terminal operators, and the like, are just as much a part of national maritime industry as are the ships which carry the cargo.

In conclusion, then, I find that Star is a hard, efficient competitor but not a violator of law, engaging in an alternative type of pricing which is not unlawful merely because it departs from the traditional commodity rating system developed historically in connection with break-bulk shipping. I find also that its services benefit not only American exporters of forestry products but also NVOCC's who can utilize Star's FAK rate system as well as shippers who find it an economical service on the inbound transpacific trade. Other beneficiaries are ports like Coos Bay, Oregon, and Tacoma, Washington, which cannot count on conference service, especially the latter port which has invested in container freight station facilities in connection with Star's inbound transpacific containerized service. These shippers, NVOCC's and ports are also persons whose interests are entitled to protection under the Shipping Act, 1916, as the Commission stated in the *Military Cargo* case, cited above.

In a time when inflation is our number one economic problem, furthermore, I cannot find that this type of competition which may help hold down prices and offers rates which are lower but compensatory, is unlawful, contrary to the public interest or detrimental to commerce.

The Star agreement, therefore, should be approved as submitted subject to the annual reporting requirements as to vessels employed

which were imposed upon the predecessor agreement. (See *Approval of Agreement No. 9955,* November 12, 1971; Ex. 1A).

ULTIMATE CONCLUSIONS

The basic agreement which forms Star Shipping A/S is a joint venture/chartering arrangement with continuing aspects and is subject to section 15 of the Shipping Act, 1916, on at least three grounds, as an agreement giving special privileges or advantages, controlling or regulating competition, or establishing a cooperative working arrangement. To a lesser extent the agreement also resembles those regulating rates and apportioning earnings. The agreement, while having some aspects resembling corporate organization, goes beyond those features. Its status is therefore not determined by the doctrines enunciated in *Federal Maritime Commission v. Seatrain* or in the *Sea-Land/U.S. Lines* case.

Neither the presence of parties to or portions of the agreement which are not subject to Commission jurisdiction nor the fact that the agreement was initiated under Norwegian law on Norwegian soil serves to extinguish the application of section 15. Extraterritorial application of the Shipping Act is by now well established in case law.

Evidence relating to rates and ratemaking practices of Star is properly to be considered in determining approvability of the Star agreement under section 15 even if the basic agreement is not essentially a rate-fixing agreement. The Commission's responsibility is to maintain constant surveillance over parties to section 15 agreements to insure that they are complying with the requirements of all provisions of the Shipping Act. Section 15 itself expressly refers to "violation of this Act" as one of the four standards to be considered.

Although the Commission's Order initiating this proceeding did not specifically frame issues under other sections of the Act such as 14 Fourth, 16 First, or 18(b)(5), respondents were put on notice that such issues would be litigated prior to the hearing, understood the issues, and in fact presented evidence in their own defense. Respondents, furthermore, made no effort prior to hearing to seek clarification of the Order from the Commission. Under all these circumstances there was no violation of the Administrative Procedure Act or principles of due process.

Star's rate structure and ratemaking practices in the inbound transpacific trade are not in violation of any provision of the Shipping Act. An FAK rate structure is not *per se* violative of law nor are volume discounts or allowances to shippers tendering containers which they own or lease. Violations of section 14 Fourth or section 16 First of the

Act involve questions of unjust discrimination or unreasonable preference, prejudice, etc. The Commission has always held these to be questions of fact. There is no substantial evidence that Star has in fact unduly discriminated or unreasonably prejudiced any identified shipper or consignee, not one of whom testified or protested Star's ratemaking practices. Star has, furthermore, offered explanations for its volume discounts, based upon competitive and other factors besides cost, which is not the only ratemaking factor than can justify such a rate structure.

There is no evidence that Star's rate levels are unreasonably low. On the contrary, unrefuted evidence indicates that Star's rates, on the whole, more than meet fully distributed costs on the inbound transpacific leg. There is similarly no substantial evidence that Star has violated any provision of law regarding its container allowances, outbound service and rate pattern, or arrangements to handle oncarriage.

On the whole, Star appears to be an efficient, low-cost competitor of some significance in the inbound transpacific trade. There is no persuasive evidence showing that such competition by Star must be proscribed, especially at a time when inflation is the number one problem which this country is facing.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 1, 1974.

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AGREEMENTS UNDER SECTION 15: See also Jurisdiction; Terminal Leases

—In general

Contention that arrangements which a carrier entered into with complainant and a warehouse company, relating to providing complainant with terminal facilities and services other than at the carrier's terminal, were the type required to be filed with the Commission pursuant to section 15 of the 1916 Act, was rejected. The agreements did not fall within any of the seven categories enumerated in section 15. The Supreme Court's decision in Volkswagenwerk does not stand for the proposition that the categories have been eliminated from section 15. Section 15 does not embrace every agreement between carriers and persons subject to the Act. Levatino & Sons, Inc. v. Prudential-Grace Lines, Inc., 82 (108–110).

An arrangement which a carrier had with a warehouse company to provide complainant and other importers, if they so desired, with storage and handling service not significantly different from the storage and related services provided to importers who used the carrier's own terminal, did not fix rates, give "special rates, accommodations, or other special privileges or advantages," or constitute an "exclusive, preferential, or cooperative working arrangement" within the meaning of section 15 of the 1916 Act. First, election to use alternative warehousing had no effect on the payment of the line-haul rate published in the carrier's tariff since the movement from shipside to the off-dock warehouse was at the carrier's expense. Second, although the alternative storage accommodations might have been physically different from the carrier's facilities, there was nothing "special" about them since they were open to any importer. Similarly, the off-deck accommodations conferred no "special privileges or advantages" for the same reason. Third, the carrier's willingness to pay for the cost of moving produce to an off-dock warehouse in fulfillment of its common carrier obligations did not constitute an "exclusive, preferential, or cooperative working arrangement" since any importer was free to elect the alternative warehousing. Id. (110–111).

The Commission does not agree that a carrier had the burden of not only showing that there were serious transportation needs or important public benefits which could be derived from the carrier's overall service, but also that the carrier had the burden of showing that there were serious transportation needs or that there were important public benefits to be derived specifically from the inbound trade from Japan and Korea. A showing of transportation necessity is not required to be made for every trade area covered by an agreement. The whole agreement is to be considered; all the benefits and all the detriments. Agreement No. 9955–1–A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Olsen & Co.; and Star Shipping A/S, 426 (430–431)

An agreement among four parties, two of which are common carriers, providing, among other things, a procedure by which one of the parties acts as the vehicle through which the other parties offer a joint service, charter vessels to one of the parties, share profits and losses, and establish corporate management of one of the parties is not outside the scope of section 15 of the 1916 Act. The agreement establishes an ongoing joint service with chartering arrangements and further provides for apportioning profits or losses among the principals in accordance with their respective vessel contributions. The agreement does not eliminate the separate identities of the two carriers or the other parties to the joint venture. The very purpose of the agreement is to establish a separage carrier entity to conduct the joint service. Not only is the separate carrier a viable entity apart from its three owners, no one of which has majority control, with separate management, but the carrier may even purchase or charter ships from persons other than its three owners and, if conference agreements permit, the carrier and its three owners may enjoy separate voting privileges whenever they choose to join such conferences. Id. (453–455).

Agreement among four parties, two of which are carriers, establishing a joint service/chartering enterprise is subject to section 15 of the 1916 Act as an agreement "giving or receiving special rates, accommodations or other special privileges or advantages." The carrier member established by the agreement enjoys a special privilege and advantage over other carriers with whom it may compete worldwide by being able to charter vessels from its three owners who have committed vessels to it and have cooperated in a vessel building program. One of the owners is a carrier with whom the other carrier could compete although it does not do so, and another owner is a former carrier who is theoretically free to reenter U.S. trades as a common carrier if he so chooses. As to a contention that the agreement operates to increase rather than lessen competition since the output of vessels has enabled a new line to emerge on many trade routes, an entity

resulting from an agreement may enjoy special privileges and advantages precisely because the agreement expanded its services and enhanced its competitive ability. Id. (455–457).

Agreement among four parties, two of which are carriers, establishing a joint service/chartering enterprise is subject to section 15 of the 1916 Act as an agreement for "controlling, regulating, preventing, or destroying competition." One of the carriers enjoys two votes on the board of directors of the corporate carrier established by the agreement and may disapprove any corporate action. Therefore, one carrier has some control over the operations of another carrier. The agreement enables one carrier to disapprove any move by the other carrier into a trade in competition with it. Id. (455, 457).

Agreement among four parties, two of which are carriers, establishing a joint service/chartering enterprise is subject to section 15 of the 1916 Act as an agreement "in any manner providing for an exclusive, preferential or cooperative working arrangement." In view of the fact that the agreement establishes an ongoing joint venture and has the characteristics of agreements which give special privileges or advantages and agreements which control or regulate competition, it is evident that the agreement constitutes a "cooperative working arrangement." Id. (455, 457–458).

If an agreement is subject to section 15 at all, it is the entire agreement which must be filed for approval even though non-jurisdictional parties are signatories. The Commission cannot dictate to parties outside of its jurisdiction, but it can issue its orders against those signatories who are carriers or other persons subject to the 1916 Act and in that fashion, disapprove, cancel or modify an agreement. Id. (458–459).

A doctrine that "proximate cause" must be shown between an agreement and an allegedly unlawful activity in a section 15 proceeding before evidence of the activity can be considered is inconsistent with the express language of section 15 and with the Commission duty of close and constant surveillance over parties operating under approved agreements. The doctrine may have some validity, but if so, it is only in terms of how much weight will be given to evidence of a particular activity in determining whether a basic agreement itself should be disapproved or modified. Id. (468).

If the Commission is to disapprove, cancel, or modify an agreement pursuant to section 15 of the 1916 Act, it must adduce substantial evidence to support a finding under one of the four standards of section 15. Consistent with judicial admonitions, the Commission will not disapprove an agreement on the basis of "speculative possibilities" or the "bare possibility" that it may violate the Act, or without a

"tangible showing" that the agreement is contrary to the public interest. Id. (469–470).

—Antitrust laws

The power of the Commission to grant immunity from antitrust acts makes Section 5 of the Federal Trade Commission Act (unfair competition) inapplicable to an amendment of the Pacific Westbound Conference dual rate contract to include overland common point territory. The antitrust provision of section 15 (which includes section 14b contracts) specifically refers to the Sherman Antitrust Act and also refers to amendments and acts supplementary thereto. The Federal Trade Commission Act supplements the Sherman Act and was intended to remedy deficiencies in the Sherman Act. Pacific Westbound Conference—Application To Extend Its Exclusive Patronage Contract System To Include Its OCP Territory, 308 (313, 329).

The question of Commission jurisdiction under section 15 of the 1916 Act does not depend on the status of an agreement under the antitrust laws. An agreement may be subject to section 15 without constituting a per se violation of those laws. Although approval of an agreement exempts it from the reach of those laws and it is proper for the Commission to consider the extent of an agreement's invasion of such laws under the public interest standard of section 15, the statute is broadly drafted and establishes its own standards and criteria without regard to the antitrust laws. If an agreement has minimal impact on competition and little or no intrusion on the policy established by the antitrust laws, this fact may significantly reduce the burden which the proponents of the agreement must sustain in justifying their agreement. Agreement No. 9955–1–A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Olsen & Co.; and Star Shipping A/S, 426 (462).

—Assessment formula

Agreement finalizing an assessment formula to fund a Pay Guarantee Plan for longshoremen, relating to a collective bargaining agreement between a corporation composed of stevedore companies and steamship lines and the ILWU, does not subject automobiles, which are assessed on a different basis than other cargo, to any undue or unreasonable prejudice in violation of section 16 of the 1916 Act, nor is the assessment charged automobiles an unreasonable practice related to receiving, handling, storing or delivery of property in violation of section 17 of the Act. Under the test laid down by the Supreme Court in *Volkswagenwerk* it is not necessary to make minute inquiry whether the benefits received by one type of cargo precisely corre-

spond to the benefits received by a different type of cargo. It is sufficient if any disparity which may result falls within reasonable tolerances. Here, the assessment formula was worked out in protracted negotiations among the interested parties and constitutes a more reasonable solution to the problems presented by the need for an agreement acceptable to a large number of parties with varying interests than any method of theoretical evaluation of benefits against burdens could have produced. Agreement No. T–2635–2 Pacific Maritime Association Final Pay Guarantee Plan, 13 (35).

Neither the Supreme Court's dictum in *Volkswagenwerk*, nor any subsequent Commission instruction prescribes any particular method of arriving at an assessment formula under an arrangement to fund benefits for ILWU members. Nor is there any indication that the courts or the Commission have proscribed mediation among interested parties, as was the method used in the present cases—including complaining parties—as an appropriate method to arrive at a solution of such a funding problem, provided the result is workable in the real world of maritime commerce and labor relations and meets the tests of sections 16 and 17 of the 1916 Act. The assessment formula here cannot be said to be outside the perimeter of reasonable relation between burden and benefit required of such agreements by sections 16 and 17 of the 1916 Act. Id. (36–37).

Agreement containing an assessment formula to fund a Pay Guarantee Plan for ILWU members is not, by reason of the fact that automobiles are assessed on a different basis than other cargo, unjustly discriminatory or unfair and may be approved pursuant to section 15 of the 1916 Act. Id. (39).

In general an assessment formula based on manhours in whole or in part is unfair because it assesses least those who have benefited most under an assessment plan for labor benefits, namely, those who have been able to increase productivity by decreasing manhours through the use of mechanization. On the other hand, a tonnage basis for assessments provides the basis for more nearly relating burdens imposed under an assessment plan both to benefits received under the plan because of increased productivity and to responsibility for such increased productivity. Since burdens under the plan are based on the amount of tonnage carried, assessments will vary directly in accordance with the increase in productivity or decrease in manhours and will impose the greatest burden on those categories of cargo which have most increased productivity or decreased manhours and have benefited the most because of increased productivity and reduced manhours. A manhour basis for assessment may be proper in particular instances, such as the prevention of diversion of a certain category

of cargo from a port which could be caused by a tonnage assessment. Agreement No. T–2635–2 Pacific Maritime Association Final Pay Guarantee Plan, 393 (412–413).

The comparison most relevant in determining the reasonableness of an assessment of automobiles is its relationship to the assessment on breakbulk cargo, which pays the lowest per hour cost, has benefited least from mechanization, since it does not use Ro/Ro carriage, containerization, or other specialized mechanized handling methods, and thus is least responsible for manhour loss due to mechanization. The record in this proceeding supports an effective assessment on automobiles of approximately half again that placed on breakbulk cargo. Id. (414).

Agreement providing for the formula for assessment of Pacific Maritime Association members to fund a pay guarantee plan (insofar as it applies to the carriage of automobiles) is approved under section 15 of the 1916 Act. Approval is not approval of the formula for all time. The Commission has continuing jurisdiction over the formula agreement and will examine the agreement afresh, on complaint or on its own motion, whenever it appears that changed circumstances may require such action. Id. (425).

—Collective bargaining agreements

The Commission would not defer jurisdiction to the NLRB or the courts and await their decision before considering whether a master collective bargaining agreement and a supplemental agreement, entered into by the Pacific Maritime Association and the ILWU, embody any agreements between and among members of the PMA which are subject to section 15 of the 1916 Act; whether implementation of the contracts by the PMA and the ILWU would result in violations of sections 16 and 17; and whether there are labor policy considerations which would exempt the agreements or practices from any provision of the aforementioned sections of the Act. As to deferral to the NLRB, the complaint alleges not that the parties have refused to bargain but rather that they have entered into an agreement in violation of the shipping and antitrust laws. The Commission has been vested with authority over the approvability of the agreement and the exercise of such authority is consistent with the principle of primary jurisdiction. As to deferral to the courts, a federal district court has already stayed a counterpart court case. The Commission cannot simply defer to the courts matters which are so intricately involved with its responsibility under the shipping statutes. Pacific Maritime Association—Cooperative Working Arrangements, 196 (198–199).

Contention that since the Pacific Maritime Association is an association with some members who are not "common carriers" or "other persons subject to this Act," and since one of the parties to the collective bargaining agreement is a labor union, the Commission has no jurisdiction over the master collective bargaining agreement between the PMA and the ILWU, is rejected. The arguments have been laid to rest by the Commission in a prior case [16 FMC 381] and by the court in *NYSA* v. *FMC*, 495 F2d 1215. Id. (200).

The Commission had jurisdiction over an agreement which supplemented a master collective bargaining agreement between the Pacific Maritime Association and the ILWU. The Supreme Court in *Volkswagenwerk* [390 US 261] found a similar agreement to be subject to Commission jurisdiction. Here, the purpose of the supplemental agreement is to do away with the "free ride" previously enjoyed by petitioner ports and other similarly situated ports and to place nonmembers on the same "competitive" basis as members of the PMA. The effect of the agreement is to control or affect competition between members and nonmembers. Section 15 of the 1916 Act specifically subjects to Commission jurisdiction all agreements between persons subject to the Act which control, regulate or prevent competition. Thus the supplemental agreement must be filed for Commission approval unless it is entitled to a "labor exemption." Id. (201).

In determining whether labor-related agreements are subject to the provisions of the 1916 Shipping Act, or "labor exempt," the Commission will proceed on an *ad hoc* case-by-case basis and apply the various criteria evolved by the courts as guidelines for each factual situation. The criteria are: 1. The collective bargaining agreement must be in good faith or "arms-length" or "eyeball to eyeball." 2. The matter is a mandatory subject of bargaining, intimately related or primarily and commonly associated with a *bona fide* labor purpose. 3. The result of the agreement must not impose terms on entities outside of the collective bargaining group. 4. The union must not be acting at the behest of or in combination with nonlabor groups. The criteria are not exclusive or determinative in each and every case. Id. (202–203).

The matter of agreement between the Pacific Maritime Association and the ILWU, was not a mandatory subject of collective bargaining. Insofar as the agreement changed the treatment of "ready men" and required all direct hiring to be in accordance with PMA procedures, it obviously affected hours or working conditions. Since the primary purpose of the agreement was to bring nonmembers into the PMA "camp," the fact that the agreement affected hours or working conditions was only incidental. While this finding may be sufficient to con-

sider withholding a "labor exemption", the Commission's ultimate conclusion that the agreement is not entitled to a labor exemption rests on additional grounds. Id. (204).

A supplemental agreement between the Pacific Maritime Association and the ILWU is specifically designed to compel nonmember entities to join PMA under threats of exclusion from the ILWU workforce. As such it clearly imposes terms and conditions upon persons outside the bargaining unit. While nonmembers are allowed to negotiate separate contracts, the contracts must conform with the provisions of the PMA—ILWU supplemental agreement and the master collective bargaining contract. The supplemental agreement also requires, inter alia, that nonmembers adhere to PMA labor policies pursuant to a work stoppage by ILWU. The supplemental agreement restricts nonmembers' right to bargain and thereby imposes such terms upon entities outside the collective bargaining agreement as to preclude the granting of a "labor exemption." Id. (205–2096, 208).

In the final analysis, the Commission's assertion of jurisdiction over a labor-related agreement requires a consideration of the impact of such agreement on the competitive conditions in the industry, vis-à-vis its impact on the collective bargaining process. The Commission finds that while a supplemental agreement between the Pacific Maritime Association and ILWU has a minimal effect on the process, it has a potentially severe and adverse effect upon competition under the Shipping Act as would justify consideration of its approvability under the standards thereof. Id. (208).

Petitioners, nonmembers of the Pacific Maritime Association, who would be required to submit to the terms or incur the sanctions of an agreement between PMA and ILWU demonstrated the possible adverse impact of the agreement and the effect its implementation could have on their ability to compete with PMA members. Therefore, implementation of the agreement, as it may affect the receiving, handling, storing and delivery of cargo at petitioner ports, may involve violations of sections 16 and 17 of the 1916 Act. Id. (209).

—Hearings

Charges and conditions imposed by the lessee of grain elevator facilities on stevedores using the facilities did not constitute a modification of the approved lease agreement between the terminal operator and the Port. The lease did not restrict the lessees' authority to establish and maintain rates for the handling and storage of grain, save only that the lessee could not assess dockage charges and rates for storage and handling of grain had to be competitive and comparable

with rates at competitive ports. The record showed that the rates were competitive. There were no conditions, restrictions, or qualifications contained in the order approving the lease. The Commission may not lawfully modify, reduce, or restrict the approval previously give without initiating and following the notice and hearing procedures established by section 15 of the 1916 Act and section 9 of the Administrative Procedure Act. Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 140 (158–160).

—Issues

Contention that consideration of rate issues in a proceeding to determine the approvability of a section 15 agreement would be a violation of due process since the order of investigation failed to give notice of such issues, was rejected. In an administrative proceeding a party is entitled to reasonable notice of the issues in controversy (section 5(a), Administrative Procedure Act). Prior to the issuance of the order of investigation, the proponent carrier and adversaries of the agreement had engaged in a preliminary debate concerning the carrier's ratemaking practices. The order of investvation not only specifically referred to the protests and the carrier's reply, stating that the Commission considered all of the pleadings, but framed the issues by including all the standards enumerated in section 15, including the standard pertaining to the issue whether an agreement "is in violation of the Shipping Act, 1916." This was notice that the Commission might make findings that the agreement violated any of the substantive provisions of the Act, including sections 14, 16, 17 or 18b which would cover unlawful rates or rate making practices. At no time was clarification of the issues requested. Agreement No. 9955–1–A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Osen & Co,; and Star Shipping A/S, 426 (463–464).

—Rates

In a complaint case wherein a specific violation of the 1916 Act is alleged, the complainant has the burden of showing the violation. By alleging a specific violation in the case involving the approvability of an agreement under section 15, the burden cannot be artificially shifted. Even though the parties to an agreement may have the burden of showing benefits to be derived by approval, the parties cannot be saddled with the burden of proving that there is no violation of the Act merely because an allegation of a violation of a specific section of the Act is alleged. In this case, there was no showing that the FAK or volume discount rates of a carrier, party to a section 15 agreement,

were in violation of any section of the Shipping Act, 1916. Agreement No. 9955–1–A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Olsen & Co.; and Star Shipping A/S, 426 (429)

Issue relating to a carrier's rates is warranted and is properly within the scope of the responsibilities of the Commission in a section 15 proceeding. Id. (463).

Contentions of a carrier that any evidence pertaining to its rates or ratemaking practices is totally irrelevant on the grounds that the agreement under investigation has nothing to do with rates or rate-fixing; that, in the absence of a showing that the agreement itself is the "proximate cause" of the carrier's decision to charge FAK, per container, or volume rates, an examination of the lawfulness of such rates is not properly within the scope of a section 15 investigation; that, in cases where rates or ratemaking practices were investigated in a section 15 proceeding, the agreement concerned was a conference agreement, the very essence of whose authority is rate-fixing, are rejected. The Commission's function in section 15 matters is to exercise a continuing supervision over the parties to an agreement and the operations of the agreement without qualification. There is no limited supervisory role for the Commission in which the Commission disclaims interest in certain practices of parties to an agreement even if there is evidence that such practices may be detrimental to commerce or otherwise in violation of the Act. Id. (465).

The Commission's authority over rates in foreign commerce is not plenary as it is in the domestic offshore trades under the 1933 Act. The Commission does, of course, have full power to cancel an agreement approved under section 15 of the 1916 Act provided that one of the four standards enumerated in that section has been violated even if the matter concerns only rates. Id. (471).

—Surcharges

Where a surcharge had not been found to violate any provisions of the 1916 Act and complainant gave no reason as to how it was contrary to the public interest, a charge that it violated section 15 of the Act, as being contrary to the public interest was dismissed. Commodity Credit Corp. v. Lykes Bros. Steamship Co., Inc., 49 (56).

—Transshipment agreements

Contention that a carrier failed to file transshipment agreements as required by section 15 of the 1916 Act is not supported by the record. Assuming the relevancy of a few arrangements to the question of approvability of the carrier's basic agreement, the record does not

establish whether these arrangements are more than occasional occurrences rather than repetitive, through-movement patterns established by agreement with other carriers. Agreement No. 9955–1–A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Olsen & Co.; and Star Shipping A/S, 426 (483).

COMMON CARRIERS

—*Duties*

A common carrier has the basic duty to take the goods of all who offer unless his complement for the trip is full. Where the demand for space exceeds the supply, a common carrier must equitably prorate its available space among shippers. Levatino & Sons, Inc. v. Prudential-Grace Lines, Inc., 82 (104).

With respect to the duty of a common carrier to take the goods of all who offer, a carrier must establish a reasonable plan in order to cope with periods of congestion and must fill its capacity in a reasonable and just manner when such periods occur. A carrier should exercise some care in avoiding continual overselling which results in refusals to honor commitments. Id. (104).

CUSTOMHOUSE BROKER: See Jurisdiction

DEVICES TO DEFEAT APPLICABLE RATES

The proper standard to determine whether a *party* (in this case, a freight forwarder acting solely as a customhouse broker) has "knowingly and wilfully", violated section 16 of the 1916 Act is purposefulness or obstinacy or intentional disregard of the statute or plain indifference to its requirements. "Plain indifference" equates with a wanton disregard from which an inference can be drawn that the conduct was, in fact, purposeful. The key is whether a party was in possession of sufficient facts to raise a doubt as to the accuracy of the bills of lading description. Viking Importrade Inc.—Possible Violations of Section 16, First, 1 (10).

Ocean freight forwarder acting solely as a customhouse broker could not be found to have violated section 16 in connections with certain shipments. The broker could only be charged with failure to make diligent inquiry into the correctness of the freight rates which it said it had no reason to make and indeed could not properly make under regulations of the Customs Bureau. However, that may be, the evidence fell far short of establishing gross negligence. Id. (11).

Consignee of shipments did not violate section 16, First, by obtain-

ing or attempting to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. The consignee could reasonably have supposed that the "marks and numbers" placed on the bills of lading and attachments thereto were a sufficient augmentation of the descriptions given as to have informed the carrier of the actual nature of the specific commodities involved, and that, as a result, the commodities had been rated and the freight gauged accordingly. While the consignee's handling of the shipments was somewhat lax, casual and negligent, it appeared that inadvertent error, loose procedures and other types of ordinary negligence—as opposed to gross negligence—might have accounted for the classification "errors" involved. Id. (11).

Contention that a carrier entered into an unlawful settlement with importers of fruit and produce (in connection with failure to provide space accommodations for cargo) other than complainant in satisfaction of formal complaints filed with the Commission, and that the carrier's action in paying $81,000 to such importers was "discriminatory" and a "rebate" in violation of sections 16 and 17 of the 1916 Act, is rejected. Settlements are encouraged and every presumption is indulged in which favors their fairness, correctness, and validity generally. They are not ordinarily open to collateral attack. There had been no attempt to conceal anything from competitors. The essence of an "unjust or unfair device or means" prohibited by section 16 Second is an element of deception or concealment. Even a rebate is not held to be in violation of section 16 Second unless it is founded on a false claim, etc. Levatino & Sons, Inc. v. Prudential-Grace Lines, Inc., 82 (112–113).

DISCRIMINATION

Agreement containing an assessment formula to fund a Pay Guarantee Plan for ILWU members is not, by reason of the fact that automobiles are assessed on a different basis than other cargo, unjustly discriminatory or unfair and may be approved pursuant to section 15 of the 1916 Act. Agreement No. T–2635–2 Pacific Maritime Association Final Pay Guarantee Plan, 13 (39).

A war risk surcharge imposed on shipments from certain U.S. ports to Beirut, Lebanon, did not violate section 17 of the 1916 Act because a surcharge was not imposed on shipments from the Great Lakes, Canada, and the U.S. Pacific Coast to Beirut, or from Beirut to U.S. Gulf ports, or from U.S. ports to Israeli ports. In order for discrimination to exist under section 17 there must be two shippers of like traffic over the same line between the same points under the same circum-

stances and condition but who are paging different rates. Patently, such was not the case here. Commodity Credit Corp. v. Lykes Bros. Steamship Co., Inc., 49 (56).

Proceeding involving the failure of a common carrier to provide space accommodations to complainant for cargoes which the carrier had previously contracted to carry is remanded for full evidentiary hearing and specific findings (1) as to whether the carrier subjected complainant to unjust discrimination or undue or inreasonable prejudice or disadvantage in violation of sections 14 Fourth and 16 First of the 1916 Act, (2) as to the amounts of cargo booked by the carrier which the actions of the carrier caused to be left on the pier, and (3) as to why the carrier's loading and booking procedures were inadequate and of sufficient extent to amount to a failure to have observed reasonable procedures and practices in violation of sections 14 Fourth and 16 First. The issue had originally been limited to the question of discrimination by the carrier against complainant but had been broadened by a succeeding Administrative Law Judge to include the cargo of other shippers. The carrier was entitled on remand to present evidence to rebut the broader charge. Levatino & Sons, Inc. v. Prudential-Grace Lines, Inc., 82 (86–88).

In resolving the issue of whether a carrier violated sections 14 Fourth and 16 First by shutting out complainant's cargo which it had agreed to carry, the Judge found that the general prohibition of the sections against any carrier unfairly treating any shipper had been breached by the carrier with respect to both complainant and other shippers in the trade, stating that "the violations of section 14 Fourth and 16 First do not center on discrimination against [complainant], since the record clearly shows that numerous shippers suffered shutouts." The Commission does not necessarily agree with this conclusion or the principle of law on which it is based. Id. (86, 103–104).

Violations of section 16 or section 17 of the 1916 Act are not shown by the mere existence of preference, prejudice, or discrimination. In order to constitute violations, such preference, prejudice, or discrimination must be "undue," "unjust", or "unreasonable", which are factual questions for Commission determination. Id. (106).

Contention that a carrier failed to provide complainant with terminal and fumigation facilities but did so for other receivers of fruit and produce at the carrier's terminal in Port Newark, and that as a consequence complainant was forced to provide its own facilities, in violation of sections 16 and 17 of the 1916 Act, was rejected. The carrier was faced with congestion at its terminal and it arranged to provide alternative storage space to complainant and other produce importers who desired it. It is in the public interest to relieve congestion and,

indeed, the public interest requires that congestion be minimized in the interest of efficient water transportation. It is also not unlawful for a common carrier, as here, to contract out part of its obligations with outside companies. The record failed to show that complainant, in using facilities other than the carrier's terminal, was deprived of terminal services and facilities which differed significantly from those enjoyed by other importers who did not avail themselves of the option to engage the services of outside warehouse companies. Id. (105–107).

Contention that a carrier entered into an unlawful settlement with importers of fruit and produce (in connection with failure to provide space accommodations for cargo) other than complainant in satisfaction of formal complaints filed with the Commission, and that the carrier's action in paying $81,000 to such importers was "discriminatory" and a "rebate" in violation of sections 16 and 17 of the 1916 Act, is rejected. Settlements are encouraged and every presumption is indulged in which favors their fairness, correctness, and validity generally. They are not ordinarily open to collateral attack. There had been no attempt to conceal anything from competitors. The essence of an "unjust or unfair device or means" prohibited by section 16 Second is an element of deception or concealment. Even a rebate is not held to be in violation of section 16 Second unless it is founded on a false claim, etc. Id. (112–113).

The intra-port anticompetitive aspects of the operation of virtually all of the modern container handling facilities at the Port of Philadelphia by commonly controlled lessees of the facilities warrant disapproval of one of the two leases, such disapproval being based on the undue or unreasonable preference or privilege to the lessee to the detriment of other competing terminal operators/stevedores in violation of section 16 First of the 1916 Act. The lease must be disapproved in that approval in concert with the other lease would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act. The other lease is approved, for by approving, the lessee will not be deprived of all container operations at the Port, but rather will be allowed to retain its lease on the most utilized modern container facility. Agreements Nos. T–2455/T–2553, 115 (136).

TTT, in offering indirect services merely makes known its services. It does so through conventional means of advertising and personal visits. The Commission has never considered imposing a ban on this form of soliciting of cargo by carriers. Unless there are improper concessions, rules or practices, there are no grounds for charges of illegal conduct. Solicitation by itself is not illegal. Even if the offering of indirect services is accompanied by monetary inducements, this is not intrinsically unlawful. Each case of this nature must be judged in

its entirety. It is not indirect service which may be unlawful but rather absorption and that only to the extent that it subjects a port to undue prejudice or unjust discrimination. Contention that a "water carrier may not handle a port's local cargo by any means other than direct water service to that port" is inaccurate. Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 234 (241–242).

Neither the "naturally tributary concept" of section 8 of the 1920 Act, nor the prescriptions of sections 16 and 17 of the 1916 Act relating to unjust, unreasonable or discriminatory actions, vest a port with a monopoly over local cargo. These provisions merely mean that improper ratemaking devices may not be employed to channel the flow of cargo elsewhere. Unless barred by restrictions not here in issue, all carriers and ports have a right to fairly compete for all cargo. Id. (242).

Exception to a finding that the proposed Pacific Westbound Conference overland non-contract rates will be unjustly discriminatory between exporters from the United States and their foreign competitors was not well taken. There was no evidence to show a disparity between the rate on a commodity outbound from the United States to a foreign destination and the rate on the same commodity from another foreign country to that same foreign destination. Pacific Westbound Conference—Application To Extend Its Exclusive Patronage Contract System To Include Its OCP Territory, 308 (316).

Complainant failed to show, on the record, any misapplication of rates by the carrier in violation of section 18 (b) (3) of the 1916 Act. Neither was there shown any treatment either of cargoes or shippers which differs from that received by complainant. As a result, complainant failed to meet the burden of proof which he was bound to sustain in order to recover damages for the alleged disadvantageous, unjustly prejudicial and unjust or unreasonable treatment by the carrier in violation of sections 15, 16 and 17 of the Act. Brodhead Garrett Co. v. United States Lines, Inc., 347 (348).

While not passing on FAK rates generally, the Commission finds that the FAK rates of a carrier have not been shown to give any undue or unreasonable preference or advantage to any particular person in violation of section 16 First, establish any rate fare or charge which is unjustly discriminatory between shippers in violation of section 17, or establish a rate which is so unreasonably high or low as to be detrimental to the commerce of the United States in violation of section 18 (b) (5). A showing that a high percentage of the carrier's carryings are in electronic goods and that the carrier did not carry a wide variety of items carried by a protesting carrier which are lower rated, was not sufficient for a conclusion that the FAK rates are, in fact, discriminatory against low value, low rated commodities and discriminatory in

favor of high value, high rated commodities. There were many reasons why the lower rated commodities were not moving on the carrier. Agreement No. 9955–1–A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Olsen & Co.; and Star Shipping A/S, 426 (429–430).

With regard to volume discounts the Commission agrees with an initial decision that a carrier's volume discount rates were not per se unreasonable and that there was no showing of a violation of section 14 Fourth or 16 First of the 1916 Act. Id. (430).

Carrier's FAK rate system was not shown to be unlawful as discriminating against low-value, low-rated commodity shippers and attracting shippers of high-value, high-rated commodities. FAK rates are well known in ocean shipping and inland transportation and are not considered unlawful per se. FAK rates are based on cost of service and do not discriminate among commodities on value of service or "what the traffic will bear" considerations. There was no evidence that the carrier's rates inhibited shippers from requesting different rates nor testimony of shippers or conference witnesses that in any particular instances the high FAK rates had actually precluded movement of a particular commodity. Id. (471–473, 475).

Carrier's volume discount rates (per container) were not shown to violate section 14 Fourth of the 1916 Act because they are not related to cost savings or other transportation factors which are altered by volume of freight offered. No case establishes that volume incentive rates, volume discounts, or volume minima are unlawful per se. The carrier justified its use of the rates by citing competition with nonconference carriers; the fact that it offers a limited containeryard service; necessity to attract enough base cargo to make vessel calls economical; and encouragement of NVOCCs to use the carrier's service. It did not rely on cost savings as justification. While cost savings are certainly considered to be justification for volume discount rates, they are not the only recognized factor. Furthermore, before a violation can be found under sections 14 Fourth or 16 First, the record must establish with substantial evidence that there has, in fact, been undue or unreasonable prejudice or unjust discrimination with respect to persons or description of traffic or shippers. There was no evidence that the carrier's rates were set with any particular shipper in mind, or at such high minima that they could be used by only one or a few shippers at best. Id. (476–477).

With respect to volume discount rates, a party alleging violations of sections 14 Fourth or 16 First should first show an excessive rate spread and make some showing that the excessively high level applicable to smaller volume shipments has, in fact, inhibited movement of a commodity or prejudiced an identified shipper. If so, the carrier

should then provide justification. In the present case, these prerequisites have not been made and no shipper testified or was identified as suffering prejudice. Id. (479).

In view of the case law, there is no reason to insist upon only one type of justification for a carrier's volume discount rates, to wit, cost savings, especially since the factors offered by the carrier in justification were not refuted. Because of the carrier's inherent disadvantages in competing with a great number of carriers many of which offer more complete containerized services, because of the need to attract cargo so as to reduce per call costs on a unit basis and to assist in establishing an eastbound container service, in the interest of encouraging the NVOCC, and because of administrative cost savings, albeit limited, the carrier offered sufficient justification. Furthermore, since the case involves questions of undue or unjust discrimination or prejudice, etc., precise fixing of rates by matching them with costs or other factors is not required especially in the total absence of testimony from shippers or consignees in the trade as to harm which they are supposedly suffering from such discrimination. Id. (481–482).

DUAL RATE CONTRACTS

Canadian ports are properly included within the Pacific Westbound Conference's organic agreement and there are no jurisdictional or policy reasons for not including Canadian ports in dual rate agreements. Approval of the Canadian port inclusion will tend to insure that similarly situated shippers are quoted equal rates. Nothing the Commission could do would usurp the jurisdiction of the Canadian government within its own territory and over its own ports, and if the PWC members were to violate Canadian law, it would be no defense that the dual rate agreement is sanctioned by the Commission. Pacific Westbound Conference—Application To Extend Its Exclusive Patronage Contract System To Include Its OCP Territory, 308 (313, 328).

The power of the Commission to grant immunity from antitrust acts makes Section 5 of the Federal Trade Commission Act (unfair competition) inapplicable to an amendment of the Pacific Westbound Conference dual rate contract to include overland common point territory. The antitrust provision of section 15 (which includes section 14b contracts) specifically refers to the Sherman Antitrust Act and also refers to amendments and acts supplementary thereto. The Federal Trade Commission Act supplements the Sherman Act and was intended to remedy deficiencies in the Sherman Act. Id. (313, 329).

The primary purpose for an inquiry into free space on conference vessels is to determine whether the conference vessels will have the

capacity to carry the cargo it intends to commit to itself by the implementation of an exclusive patronage contract. In that sense the overtonnaged condition of the Pacific Westbound trade supports approval of an exclusive patronage contract, and tends to establish the commercial reasonableness of the exclusive patronage practice. Id. (315).

The Commission finds merit in challenges at least insofar as they attack the findings that some Pacific Westbound Conference lines would be compelled to leave the trade or to engage in rate wars if the application of PWC to extend its dual rate contracts to overland common point territory were disapproved, and that the nonconference competition is very predatory. The record was insufficient to support a finding of predatory competition. Likewise, the record did not support a finding that any of the PWC lines would have no other alternative but to leave the trade or engage in rate wars. However, a rate war or instability in service to the shipping public is probable if the PWC application is disapproved. Id. (317).

It does not matter whether or not the Pacific Westbound Conference trade is a "classic" example of a trade wherein a dual rate contract is justified, so long as conditions in the trade warrant approval of such a contract. The determination as to whether a dual rate contract should be permitted in a particular trade is not one of degree. Either conditions in the trade justify such a contract or they do not. Once the determination is made that a dual rate contract is justified, the extent to which it is justified becomes a meaningless consideration. Id. (317).

The Congress, the courts, and the Commission have recognized that dual rate contracts are permitted, where the other required considerations are met, when they are needed to maintain a viable conference. The threat to the continued useful existence of a conference which justifies a dual rate system is not to be limited to "fly-by-night" operators, but is to be determined by the effect on the conference of nonconference competition from whatever type of competitor. Id. (317).

The Commission does not advance, support or approve the proposition that a conference may unreasonably elevate its rates and thereby justify a dual rate contract on the basis of the disparity between those rates and the rates of non-conference competition. Id. (318).

The dual rate contract system is subject to the same standard of approvability as agreements under section 15 of the 1916 Act, involving "an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of "the public interest." The phrase "public interest," as used in section 14b of the Act, has the same meaning as does that phrase in section 15. Since the proposed extension of a

conference dual rate contract to overland common point territory runs counter to the principle of the antitrust laws, it is contrary to the public interest unless the restraint is necessary to achieve some legitimate commercial objective. Id. (319).

It is to avoid diminution in service to shippers or service instability, to the possible detriment not only of the shippers but of the commerce of the United States as well, for which the dual rate contract is permitted. The Commission will not require that the diminution in service actually occur before permitting an action which will prevent that evil. The bare assertion by a conference that instability in service will result at some future time does not provide sufficient basis to approve a dual rate contract. However, where, as here, that assertion is circumscribed by a great reduction in the volume of cargo carried by the conference, and by vigorous non-conference competition, carried at rates substantially below the rates of the conference, which attracts cargo, in part, by the payment of freight forwarder compensation at a rate double that paid by the conference, and which discourages the tender or refuses the carriage of low rated cargo while vigorously soliciting high revenue cargo, the possibility of a disruptive and destructive rate war is sufficiently enhanced to support the approval of a dual rate contract. Id. (321–322).

FREIGHT FORWARDING

Whatever the merits of a contention that the legislative history of adopted freight forwarder legislation was not germane to the bill ultimately adopted by a later Congress and could not be used to show that Congress, in enacting the freight forwarder law, intended licensees to be totally independent of any shipper connection. The contention is disposed of by the fact that the language of the freight forwarder law is clear and unambiguous and requires absolute independence. Hugo Zanelli, 60 (62).

The requirements of the freight forwarder law may impose "hardships" and "inconvenience" which are justified by the purpose to be served by the statute. Accepting a contention that a particular freight forwarder's activities will somehow be adversely affected by affirmance of a holding that the forwarder must be totally independent of shipper connection, an argument that no "evil" was found in the challenged forwarder activities was rejected as irrelevant. A licensed freight forwarder must maintain certain "standards of fitness". That compliance with these standards may inconvenience the forwarder or cause it to alter its operation may be regrettable but is not controlling. Id. (62–63).

The Commission has specifically rejected, and neither the language of the laws nor their legislative history, lend support to, a contention that if a freight forwarder licensee abstains from collecting brokerage from ocean carriers on those shipments in which he has obtained a beneficial interest or, presumably, acts as purchasing agent or financier, the congressional purposes in enacting section 44 of the 1916 Act, relative to the independence from shippers required by the law, are thereby subserved. Id. (72).

Sections 1 and 44 of the 1916 Act are unambiguous in their language. Section 44(b) unequivocally requires that a licensee be "an independent ocean freight forwarder" as defined in section 1. Section 1 unequivocally defines an "independent ocean freight forwarder" as a person "who is not a shipper or consignee or a seller or purchaser of shipments . . . nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper, consignee. . . ." Since the forwarder here involved acts as a purchasing agent for certain consignees, purchases shipments, and has obtained a beneficial interest in shipments no further inquiry as to the legislative history of the freight forwarder law is necessary. Resort to legislative history is unnecessary if a statute is clear and unambiguous. Id. (72–73).

The legislative history of the freight forwarder statute provides no evidence that Congress intended that something less than total independence from shippers was intended to be permitted, a status which could be characterized as qualified independence, wherein forwarders could operate under shipper control provided they abstained from receiving brokerage from carriers. If anything, the legislative history confirms the Commission's and the court's views to the contrary. Id. (76).

Contentions that section 44(a) of the 1916 Act, which states that a "person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license", implies that an occasional seller may hold a forwarder's license is rejected. The purpose of the quoted language was not to allow a licensee to be a shipper but to permit a shipper, whose business is not forwarding, to dispatch his own shipments without a license. Id. (78).

Section 44 (e) of the 1916 Act, which provides that "a common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others," does not permit a forwarder to dispatch shipments in which he has a beneficial interest, so long as he abstains from collecting brokerage. Such a reading would emasculate the freight forwarder law which defines "independent ocean freight forwarder" as a person devoid of any

beneficial interest in shipments he forwards without qualification. Id. (78).

Contention that no harm results if a forwarder who has a beneficial interest in a shipment abstains from collecting brokerage ignores several considerations. As a matter of law, if any activity is prohibited, good intentions or beneficial results are irrelevant. Amendment of the legislation can only be accomplished by the Congress, not by the Commission. Secondly, Congress was not only interested in preventing indirect rebating to dummy forwarders but in establishing standards of fitness to insure that forwarders would act in a manner consistent with their fiduciary relationship to shippers. Finally, it is possible for a forwarder to assist exporters and promote U.S. foreign commerce without acquiring a beneficial interest in goods shipped and thereby losing independence. Id. (79–80).

Forwarder which had acted as a purchaser and seller of certain shipments on behalf of consignee, in which he also obtained a beneficial interest, was disqualified as an independent ocean freight forwarder. Since respondent had cooperated fully with hearing counsel and the record did not indicate that he had engaged in the unlawful activities in willful violation of law, the forwarder could retain his license by ceasing and desisting from the said activities and by submitting a full report promptly to the Commission on the manner in which he has complied. Id. (81).

JURISDICTION

The Commission has jurisdiction to investigate violations of section 16 of the 1916 Shipping Act by persons or entities named in that section, whether or not they are "other persons subject to [the] Act." Thus, the Commission could investigate as to whether an ocean freight forwarder acting solely in the capacity of a customhouse broker, violated section 16 in connection with certain shipments. The legislative purpose of the 1936 amendment to section 16, First was to extend coverage of the Act to any party "who participates in the transaction" even though the participation merely has to do with necessary paper work to get a shipment through customs. Viking Importrade Inc. - Possible Violations of Sections 16, First, 1 (9–10).

Lessee and sublessor of container berths at the Port of Philadelphia was an "other person" subject to the 1916 Act by virtue of its retention of control over the use of the facilities subject to the leases in question. Inasmuch as the lessees are undisputedly "other persons" subject to the Act, the agreements fall within the Commission's jurisdiction. The Commission must examine not only the terms of an agreement but

also the competitive consequences which may be expected to flow from the agreement and other facts which show the objective and results of the agreement. The leases must be filed for approval. Agreements Nos. T-2455/T-2553, 115 (128, 134).

The Commission would not defer jurisdiction to the NLRB or the courts and await their decision before considering whether a master collective bargaining agreement and a supplemental agreement, entered into by the Pacific Maritime Association and the ILWU, embody any agreements between and among members of the PMA which are subject to section 15 of the 1916 Act; whether implementation of the contracts by the PMA and the ILWU would result in violations of sections 16 and 17; and whether there are labor policy considerations which would exempt the agreements or practices from any provision of the aforementioned sections of the Act. As to deferral to the NLRB, the complaint alleges not that the parties have refused to bargain but rather that they have entered into an agreement in violation of the shipping and antitrust laws. The Commission has been vested with authority over the approvability of the agreement and the exercise of such authority is consistent with the principle of primary jurisdiction. As to deferral to the courts, a federal district court has already stayed a counterpart court case. The Commission cannot simply defer to the courts matters which are so intricately involved with its responsibility under the shipping statutes. Pacific Maritime Association - Cooperative Working Arrangements, 196 (198–199).

Contention that since the Pacific Maritime Association is an association with some members who are not "common carriers" or "other persons subject to this Act," and since one of the parties to the collective bargaining agreement is a labor union, the Commission has no jurisdiction over the master collective bargaining agreement between the PMA and the ILWU, is rejected. The arguments have been laid to rest by the Commission in a prior case [16 FMC 381] and by the court in *NYSA* v. *FMC*, 495 F2d 1215. Id. (200).

The Commission had jurisdiction over an agreement which supplemented a master collective bargaining agreement between the Pacific Maritime Association and the ILWU. The Supreme Court in *Volkswagenwerk* [390 US 261] found a similar agreement to be subject to Commission jurisdiction. Here, the purpose of the supplemental agreement is do away with the "free ride" previously enjoyed by petitioner ports and other similarly situated ports and to place nonmembers on the same "competitive" basis as members of the PMA. The effect of the agreement is to control or affect competition between members and nonmembers. Section 15 of the 1916 Act specifically subjects to Commission jurisdiction all agreements between per-

sons subject to the Act which control, regulate or prevent competition. Thus the supplemental agreement must be filed for Commission approval unless it is entitled to a "labor exemption." Id. (201).

Agreement among parties and Star Shipping, which provides a procedure by which Star acts as the vehicle through which the other parties conduct a joint service, charter vessels to Star, share profits and losses, and establish corporate management of Star in such a manner as will accomplish the purposes, is subject to Commission jurisdiction under section 15 of the 1916 Act. While the arrangement has some of the attributes of a merger/ownership agreement in the establishment of a separate corporate Star, it transcends a mere merger and effectuates a cooperative ongoing arrangement with foreign commerce of the United States wherein all four carriers are actively participating. Furthermore, since all parties are still viable, the parties may take back their charters and continue their operations as prior to section 15 approval if the agreement should be disapproved. The parties are independently viable and, in cooperation, are actively participating in the U.S. foreign commerce through an agreement which creates ongoing rights and responsibilities over which the Commission has jurisdiction. Agreement No. 9955-1-A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Olsen & Co.; and Star Shipping A/S, 426 (427-429).

Agreements may be filed with the Commission which contain portions of no proper concern to the Commission but this situation does not affect Commission jurisdiction over these parties subject to the Act or those areas of the agreement which clearly raise Shipping Act problems. Also, agreements may overlap into different areas of substantive law and parties to them may be subject to the jurisdiction of one agency or law for one activity and another agency or law for another activity. The solution is not absolute surrender by the maritime agency of its regulatory responsibilities but caution in exercising its jurisdiction in areas where its expertise is lacking. Id. (459-460).

The fact that an agreement was one established under Norwegian law did not mean that the Commission either had no jurisdiction or should not exercise it under principles of international comity. The nationality of parties, foreign rites, or approval of foreign law do not insulate an agreement which fits into one of the categories enumerated in section 15 from the reach of that statute. Furthermore, in the law relating to extraterritoriality a critical distinction exists between foreign conspiracies in violation of antitrust laws and agreements subject to section 15. Moreover, there is no true conflict between the laws of two sovereign nations and consequently no need for the Commission to refrain from exercising jurisdiction over Norwegian parties absent a showing that the foreign sovereign has in some manner or-

dered the parties to operate in a fashion proscribed by American law. A 1968 court decision held that section 15 as well as section 14b of the 1916 Act not only applied to foreign carriers but even to the contracts of foreign nationals entered into and executed in foreign countries since the carriers chose to deliver goods to U.S. ports and to employ contracts in American commerce. Id. (459-462).

MERCHANT MARINE ACT OF 1920

The solicitation, without more, by the operator of a common carrier service between New York and San Juan and Baltimore and San Juan of shippers located in the Philadelphia port area to move their cargo through New York and Baltimore, was not violative of the shipping statutes. Under sections 16 and 17 of the 1916 Act and section 8 of the 1920 Act, the "diversionary solicitation" may be found to be illegal only if, under the circumstances, it subjects the port of Philadelphia to undue, unjust or unreasonable prejudice or disadvantage in some respect. And so the right of the port of Philadelphia to cargo from otherwise naturally tributary areas is violated only if the means of diversion can be found to constitute an undue, unjust or unreasonable practice. No basis is found in the record or elsewhere for concluding that advertising and/or direct customer solicitation, without concessions or other added inducement of some kind, is illegal. Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 234 (239-240).

Neither the "naturally tributary concept" of section 8 of the 1920 Act, nor the proscriptions of sections 16 and 17 of the 1916 Act relating to unjust, unreasonable or discriminatory actions, vest a port with a monopoly over local cargo. These provisions merely mean that improper rate making devices may not be employed to channel the flow of cargo elsewhere. Unless barred by restrictions not here in issue, all carriers and ports have a right to fairly compete for all cargo. Id. (242).

MISCLASSIFICATION OF GOODS: See Devices To Defeat Applicable Rates

OVERCHARGES: See Reparation

PRACTICE AND PROCEDURE

Decisions

Contention that the Administrative Law Judge somehow erred in mentioning a court decision in an injunction proceeding brought by the complainant in the present proceeding against the respondent in

the present proceeding, carries no weight when viewed in the context of its inclusion in the initial decision. Argument that any "reliance" by the presiding officer on the court decision was improper because the Commission's General Counsel submitted an amicus brief on the court case is totally without merit. The amicus brief related solely to the propriety of an injunction in view of the probable resolution of the issue in the Commission's proceeding on the basis of prior Commission decisions. Such briefs filed in court proceedings by the General Counsel are filed on behalf of the Commission, and the Commission recognizes no prejudice to any party's case in pending or subsequent Commission proceedings. It is the duty of the Commission to render a fair decision. Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 234 (236).

Hearings

Failure of a conference and its member lines to respond to an order to show cause why the conference agreement should not be amended to change the unanimous voting procedure for changes was most inappropriate. While the Commission might attempt to render a judgment based solely on the documentary evidence now available to it, due process considerations require that the proceeding be referred to the Office of Administrative Law Judges for hearing. Only in this way can a complete record, with full opportunity for parties to be heard, be developed and the best interests of the conference and the individual members and the public be served. Modification of Article 4 Agreement No. 3302 - The Association of West Coast Steamship Cos., 45 (46-47).

The Administrative Law Judge was correct in deciding, as a matter of law, that the mere solicitation of shippers located in the Port of Philadelphia area to move their cargo through Baltimore and New York was not violative of the shipping statutes. Accordingly, his decision to forego an evidentiary hearing was correct. To find otherwise would be stretching both the naturally tributary concept and arguments of discrimination and prejudice to an intolerable extreme and wreak havoc on the shipping industry. Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 234 (235).

Throughout the course of a complaint proceeding, involving allegations that the solicitation of shippers located in one port area to move their cargo to other ports was violative of the shipping statutes, complainants were offered every procedural safeguard as required by the Commission's rules and the Administrative Procedure Act. Complainants were offered the opportunity to amend their complaint to ad-

dress additional issues related to absorption and equalization not addressed in the complaint as filed. In granting oral argument in the Commission offered complainants further opportunity to present any legal arguments in their own behalf and on conclusion of argument even granted complainants 15 days to supply additional affidavits of fact and memoranda of law in support of their position as delineated in the original complaint. Complainants submitted a response which failed to address the issue of law at hand, and instead requested consolidation with other ongoing Commission proceedings. Id. (235).

PRACTICES

Agreement finalizing an assessment formula to fund a Pay Guarantee Plan for longshoremen, relating to a collective bargaining agreement between a corporation composed of stevedore companies and steamship lines and the ILWU, does not subject automobiles, which are assessed on a different basis than other cargo, to any undue or unreasonable prejudice in violation of section 16 of the 1916 Act, nor is the assessment charged automobiles an unreasonable practice related to receiving, handling, storing or delivery of property in violation of section 17 of the Act. Under the test laid down by the Supreme Court in *Volkswagenwerk* it is not necessary to make minute inquiry whether the benefits received by one type of cargo precisely correspond to the benefits received by a different type of cargo. It is sufficient if any disparity which may result falls within reasonable tolerances. Here, the assessment formula was worked out in protracted negotiations among the interested parties and constitutes a more reasonable solution to the problems presented by the need for an agreement acceptable to a large number of parties with varying interests than any method of theoretical evaluation of benefits against burdens could have produced. Agreement No. T-2635-2 Pacific Maritime Association Final Pay Guarantee Plan, 13 (35).

Neither the Supreme Court's dictum in *Volkswagenwerk*, nor any subsequent Commission instruction prescribes any particular method of arriving at an assessment formula under an arrangement to fund benefits for ILWU members. Nor is there any indication that the courts or the Commission have proscribed mediation among interested parties, as was the method used in the present cases—including complaining parties—as an appropriate method to arrive at a solution of such a funding problem, provided the result is workable in the real world of maritime commerce and labor relations and meets the tests of sections 16 and 17 of the 1916 Act. The assessment formula here cannot be said to be outside the perimeter of reasonable relations

between burden and benefit required of such agreements by sections 16 and 17 of the 1916 Act. Id. (36–37).

With respect to the allocation by the lessee of grain elevator facilities of the cost of the shipping gallery, the allocation of a full fifty percent of the cost to the stevedores is an unreasonable practice within the meaning of section 17 of the 1916 Act. Past applications of the Freas Formula to grain elevator operations have normally assessed one-half of the costs of the shipping gallery to the cargo (as in the present case) and one-half to the vessel. Allocation of costs must be based on benefits received, and as between stevedores and vessels, stevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel. A portion only of the fifty percent in issue is allocable to the stevedore. Baton Rouge Marine Contractors, Inc. v. Cargill, 140 (162).

With respect to the allocation by the lessee of grain elevator facilities of the total costs of the grain deck and wharf to the stevedores, the charge, inasmuch as it relates to the use of the barge unloading facility, the pile clusters, the dust collection system, and the spouts to the extent assessable against cargo or vessel, is an unreasonable practice under section 17 of the 1916 Act. Stevedores benefit from the privileges of ingress and egress from the vessel and to some degree from the use of the spouts, but in no way can the total cost for the use of the dock be attributed to stevedores. Both cargo and vessel benefit. Id. (163).

Charges imposed by the lessee of grain elevator facilities on stevedores for costs associated with dock clean-up and liaison service are unreasonable practices under section 17 of the 1916 Act. The costs were not justified on the record. The decks were cleaned only sporadically and the $25,000 per year for liaison services was unsubstantiated. Thus, those portions of the overall costs were not shown to be reasonably related to the benefits derived therefrom by the stevedores. Id. (163).

With regard to charges imposed by the lessee of grain elevator facilities on stevedores for utilities and overhead expenses, the allocation to stevedores of $933.00 per year for water, toilets, telephones and utilities does not appear to be so unreasonable as to justify disapproval. Nor does the amount of overhead expenses allocated to the stevedores appear to be reasonable. Id. (163).

The imposition by the lessee of grain elevator facilities on stevedores of an indemnity requirement of $100 per hour for delays caused by failure to provide sufficient numbers of longshoremen is an unreasonable practice under section 17 of the 1916 Act. The requirement is one-sided with no compensation awarded stevedores for delays

caused by the lessee. Likewise, the requirements for "utmost care" in stevedoring operation, for evidence of adequate liability insurance coverage insofar as the insurance companies must be acceptable to the lessee, and for posting deposits to secure payment of the services and facilities charge and the delay indemnity charges are similarly one-sided and thus unreasonable practices under section 17. With regard to the insurance requirement, it would appear to be sufficient to accept insurance coverage from any company licensed to do business in the state. Id. (164).

Failure of the lessee of grain elevator facilities to comply with the requirement of General Order 15 that terminal operators must file a schedule or tariff showing all rates, charges, etc. connected with the receiving and handling of goods was an unreasonable practice in violation of section 17 of the 1916 Act. Id. (164).

The solicitation, without more, by the operator of a common carrier service between New York and San Juan and Baltimore and San Juan of shippers located in the Philadelphia port area to move their cargo through New York and Baltimore, was not violative of the shipping statutes. Under sections 16 and 17 of the 1916 Act and section 8 of the 1920 Act, the "diversionary solicitation" may be found to be illegal only if, under the circumstances, it subjects the port of Philadelphia to undue, unjust or unreasonable prejudice or disadvantage in some respect. And so the right of the port of Philadelphia to cargo from otherwise naturally tributary areas is violated only if the means of diversion can be found to constitute an undue, unjust or unreasonable practice. No basis is found in the record or elsewhere for concluding that advertising and/or direct customer solicitation, without concessions or other added inducement of some kind, is illegal. Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 234 (239–240).

Request for reparation, based on a complaint that unwarranted storage charges were assessed against complainant because of respondent's delay in sending an arrival notice, was denied. The vessel arrive in port on November 8, 1971, was discharged November 13, and the arrival notice was sent on November 18. Complainant contended that a January 5, 1972, letter was the first notice it received. However, the letter referred to "notification originally dispatched" and thus was corroberative of respondent's contention that notice was mailed on November 18. Therefore, there was no showing of unjustness or unreasonableness in any regulation or practice of the respondent which would be violative of section 17 of the 1916 Act. Nor was there any showing of a change in charges in violation of section 18(b) (2), since the bill of lading expressly provided for the assessment of additional

costs where a deviation, as here occurred, from an anticipated route was required. William K. Mak v. Thor Eckert & Co., Inc. 258 (260–262).

Insofar as section 17 of the 1916 Act is concerned, in order for an assessment to be reasonable as applied to a particular category of cargo the correlation of benefit to the charges imposed must be reasonable and the charge must be reasonably related to the service rendered. The impact of the assessment, rather than the intent with which it is imposed, determines its lawfulness, and the benefits and burdens must be related in a more exact manner than a mere finding that a certain category receives substantial benefits under assessments. Agreement No. T-2635-2 Pacific Maritime Association Final Pay Guarantee Plan, 393 (411).

Formula for assessment of Pacific Maritime Association members to fund a plan designed to compensate longshoremen for reduced work opportunities caused by technological advances in the shipping industry is reasonable and proper under section 17 of the 1916 Act, insofar as automobiles are assessed at a rate one and one-half that imposed on breakbulk cargoes. Id. (412–419).

With respect to the question of the lawfulness of a formula for assessment of automobiles under a plan to fund certain benefits for longshoremen, as a result of decreased work opportunities, the record does not show that automobiles (assessed at one and one-half times the rate imposed on breakbulk cargo) are in any way unlawfully prejudiced or disadvantaged by the automobile assessment via-a-vis the assessments imposed on other categories of cargo. In fact, comparisons of the treatment of other categories demonstrate that automobiles are treated at least as advantageously as other classes of cargo. Id. (420).

PREFERENCE AND PREJUDICE

Agreement finalizing an assessment formula to fund a Pay Guarantee Plan for longshoremen, relating to a collective bargaining agreement between a corporation composed of stevedore companies and steamship lines and the ILWU, does not subject automobiles, which are assessed on a different basis than other cargo, to any undue or unreasonable prejudice in violation of section 16 of the 1916 Act, nor is the assessment charged automobiles an unreasonable practice related to receiving, handling, storing or delivery of property in violation of section 17 of the Act. Under the test laid down by the Supreme Court in *Volkswagenwerk* it is not necessary to make minute inquiry whether the benefits received by one type of cargo precisely corre-

spond to the benefits received by a different type of cargo. It is sufficient if any disparity which may result falls within reasonable tolerances. Here, the assessment formula was worked out in protracted negotiations among the interested parties and constitutes a more reasonable solution to the problems presented by the need for an agreement acceptable to a large number of parties with varying interests than any method of theoretical evaluation of benefits against burdens could have produced. Agreement No. T-2635-2 Pacific Maritime Association Final Pay Guarantee Plan, 13 (35).

Neither the Supreme Court's dictum in *Volkswagenwerk*, nor any subsequent Commission instruction prescribes any particular method of arriving at an assessment formula under an arrangement to fund benefits for ILWU members. Nor is there any indication that the courts or the Commission have proscribed mediation among interested parties, as was the method used in the present cases—including complaining parties—as an appropriate method to arrive at a solution of such a funding problem, provided the result is workable in the real world of maritime commerce and labor relations and meets the tests of sections 16 and 17 of the 1916 Act. The assessment formula here cannot be said to be outside the perimeter of reasonable relation between burden and benefit required of such agreements by sections 16 and 17 of the 1916 Act. Id. (36–37).

A war risk surcharge imposed on shipments to Lebanese ports did not violate the proscription of section 16 of the 1916 Act against undue prejudice or preference because no war risk surcharge was imposed on shipments from Beirut to the United States or from Canada, the Great Lakes and the U.S. West Coast to Beirut. The shipment in question did not move in competition for markets with any other shipments from any other areas. Thus, the seemingly essential competitive relationship was missing. While the Commission has often found violations of section 16 without a competitive relationship, another essential ingredient for finding unlawful preference or prejudice was missing, i.e., the alleged preference and prejudice did not stem from a common source. Respondents were not members of the Great Lakes or Pacific Coast conferences in question, and thus they could not be the common source of such alleged preference or prejudice. As for shipments from Beirut to U.S. ports, port congestion at Beirut was a large factor in the surcharge at Beirut. A vessel would call at Beirut and be given a "number", then it would call at other Mediterranean ports and return at its newly appointed time for surcharge. No comparable situation existed on the inbound leg of the voyage. Transportation factors were present here, and because they were complainant must show something more than the absence of a sur-

charge from Beirut—it must show a competitive relationship from which the failure to impose the surcharge has harmed them. Commodity Credit Corp. v. Lykes Bros. Steamship Co., Inc., 49 (53–55).

Imposition of a war risk surcharge on shipment from certain U.S. ports to Beirut, Lebanon, was not violative of section 16 of the 1916 Act because no such surcharge was imposed on cargoes shipped from U.S. Gulf ports to Israeli ports. There was a surcharge to Israeli ports denominated simply as "Israeli surcharge". Apparently, complainant's point was that the surcharge was primarily for port congestion and therefore could not have been a "war risk" surcharge. However, one of the products of the "hostilities" was port congestion. The validity of the surcharge could not depend on its appellation. Moreover, by simply denominating it as a surcharge without any qualifier, the surcharge could be "war risk", as well as "congestion", neither, or both. Transportation factors were present in the case and complainant falled to show the requisite relationship to establish a section 16 violation. Id. (55–56).

Proceeding involving the failure of a common carrier to provide space accommodations to complainant for cargoes which the carrier had previously contracted to carry is remanded for full evidentiary hearing and specific findings (1) as to whether the carrier subjected complainant to unjust discrimination or undue or inreasonable prejudice or disadvantage in violation of sections 14 Fourth and 16 First of the 1916 Act, (2) as to the amounts of cargo booked by the carrier which the actions of the carrier caused to be left on the pier, and (3) as to why the carrier's loading and booking procedures were inadequate and of sufficient extent to amount to a failure to have observed reasonable procedures and practices in violation of sections 14 Fourth and 16 First. The issue had originally been limited to the question of discrimination by the carrier against complainant but had been broadened by a succeeding Administrative Law Judge to include the cargo of other shippers. The carrier was entitled on remand to present evidence to rebut the broader charge. Levantino & Sons, Inc. v. Prudential-Grace Lines, Inc., 82 (86–88).

In resolving the issue of whether a carrier violated sections 14 Fourth and 16 First by shutting out complainant's cargo which it had agreed to carry, the Administrative Law Judge found that the general prohibition of the sections against any carrier unfairly treating any shipper had been breached by the carrier with respect to both complainant and other shippers in the trade, stating that "the violations of sections 14 Fourth and 16 First do not center on discrimination against [complainant], since the record clearly shows that numerous shippers suffered shutouts." The Commission does not necessarily

agree with this conclusion or the principle of law on which it is based. Id. (86, 103–104).

Violations of section 16 or section 17 of the 1916 Act are not shown by the mere existence of preference, prejudice, or discrimination. In order to constitute violations, such preference, prejudice, or discrimination must be "undue," "unjust", or "unreasonable", which are factual questions for Commission determination. Id. (106).

Contention that a carrier failed to provide complainant with terminal and fumigation facilities but did so for other receivers of fruit and produce at the carrier's terminal in Port Newark, and that as a consequence complainant was forced to provide its own facilities, in violation of sections 16 and 17 of the 1916 Act, was rejected. The carrier was faced with congestion at its terminal and it arranged to provide alternative storage space to complainant and other produce importers who desired it. It is in the public interest to relieve congestions and, indeed, the public interest requires that congestion be minimized in the interest of efficient water transportation. It is also not unlawful for a common carrier, as here, to contract out part of its obligations with outside companies. The record failed to show that complainant, in using facilities other than the carrier's terminal, was deprived of terminal services and facilities which differed significantly from those enjoyed by other importers who did not avail themselves of the option to engage the services of outside warehouse companies. Id. (105–107).

The intra-port anticompetitive aspects of the operation of virtually all of the modern container handling facilities at the Port of Philadelphia by commonly controlled lessees of the facilities warrant disapproval of one of the two leases, such disapproval being based on the undue or unreasonable preference or privilege to the lessee to the detriment of other competing terminal operators/stevedores in violation of section 16 First of the 1916 Act. The lease must be disapproved in that approval in concert with the other lease would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act. The other lease is approved, for by approving, the lessee will not be deprived of all container operations at the Port, but rather will be allowed to retain its lease on the most utilized modern container facility. Agreements Nos. T-2455/T-2553, 115 (136).

With respect to the issue of damages as a result of the imposition of new charges and conditions imposed on all stevedores by the lessee of grain elevator facilities at a port, there was no evidence of actual damages to the complaining stevedoring entity. The relationship between the lessee and its wholly owned subsidiary stevedore did not in and of itself render unlawful the imposition of the charges and conditions. A situation existed which could give rise to discriminatory prac-

tices but no unlawful situation in fact existed. So long as the relationship remains at arm's length, the subsidiary pays the same charges as other stevedores and no competitive advantage is given the subsidiary over other stevedores using the lessee's facilities, no unreasonable preference on privilege exists that would be violative of section 16 First of the 1916 Act. Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 140 (160).

The soliciation, without more, by the operator of a common carrier service between New York and San Juan and Baltimore and San Juan of shippers located in the Philadelphia port area to move their cargo through New York and Baltimore, was not violative of the shipping statutes. Under sections 16 and 17 of the 1916 Act and section 8 of the 1920 Act, the "diversionary solicitation" may be found to be illegal only if, under the circumstances, it subjects the port of Philadelphia to undue, unjust or unreasonable prejudice or disadvantage in some respect. And so the right of the port of Philadelphia to cargo from otherwise naturally tributary areas is violated only if the means of diversion can be found to constitute an undue, unjust or unreasonable practice. No basis is found in the record or elsewhere for concluding that advertising and/or direct customer solicitation, without concessions or other added inducement of some kind, is illegal. Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 234 (239–240).

TTT, in offering indirect services merely makes known its services. It does so through conventional means of advertising and personal visits. The Commission has never considered imposing a ban on this form of soliciting of cargo by carriers. Unless there are improper concessions, rules or practices, there are no grounds for charges of illegal conduct. Solicitation by itself is not illegal. Even if the offering of indirect services is accompanied by monetary inducements, this is not intrinsically unlawful. Each case of this nature must be judged in its entirety. It is not indirect service which may be unlawful but rather absorption and that only to the extent that it subjects a port to undue prejudice or unjust discrimination. Contention that a "water carrier may not handle a port's local cargo by any means other than direct water service to that port" is inaccurate. Id. (241–242).

Neither the "naturally tributary concept" of section 8 of the 1920 Act, nor the proscriptions of sections 16 and 17 of the 1916 Act relating to unjust, unreasonable or discriminatory actions, vest a port with a monopoly over local cargo. These provisions merely mean that improper rate making devices may not be employed to channel the flow of cargo elsewhere. Unless barred by restrictions not here in issue, all carriers and ports have a right to fairly compete for all cargo. Id. (242).

Complainant failed to show, on the record, any misapplication of rates by the carrier in violation of section 18(b)(3) of the 1916 Act. Neither was there shown any treatment either of cargoes or shippers which differs from that received by complainant. As a result, complainant failed to meet the burden of proof which he was bound to sustain in order to recover damages for the alleged disadvantageous, unjustly prejudicial and unjust or unreasonable treatment by the carrier in violation of sections 15, 16 and 17 of the Act. Brodhead Garrett Co. v. United States Lines, Inc., 347 (348).

While not passing on FAK rates generally, the Commission finds that the FAK rates of a carrier have not been shown to give any undue or unreasonable preference or advantage to any particular person in violation of section 16, First, establish any rate fare or charge which is unjustly discriminatory between shippers in violation of section 17, or establish a rate which is so unreasonably high or low as to be detrimental to the commerce of the United States in violation of section 18(b)(5). A showing that a high percentage of the carrier's carryings are in electronic goods and that the carrier did not carry a wide variety of items carried by a protesting carrier which are lower rated, was not sufficient for a conclusion that the FAK rates are in fact discriminatory against low value, low rated commodities and discriminatory in favor of high value, high rated commodities. There were many reasons why the lower rated commodities were not moving on the carrier. Agreement No. 9955–1–A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Olsen & Co.; and Star Shipping A/S, 426 (429–430).

With regard to volume discounts the Commission agrees with an initial decision that a carrier's volume discount rates were not per se unreasonable and that there was no showing of a violation of sections 14 Fourth or 16 First of the 1916 Act. Id. (430).

Carrier's volume discount rates (per container) were not shown to violate section 14 Fourth of the 1916 Act because they are not related to cost savings or other transportation factors which are altered by volume of freight offered. No case establishes that volume incentive rates, volume discounts, or volume minima are unlawful per se. The carrier justified its use of the rates by citing competition with nonconference carriers; the fact that it offers a limited containeryard service; necessity to attract enough base cargo to make vessel calls economical; and encouragement of NVOCCs to use the carrier's service. It did not rely on cost savings as justification. While cost savings are certainly considered to be justification for volume discount rates, they are not the only recognized factor. Furthermore, before a violation can be found under sections 14 Fourth or 16 First, the record must establish

with substantial evidence that there has, in fact, been undue or unreasonable prejudice or unjust discrimination with respect to persons or description of traffic or shippers. There was no evidence that the carrier's rates were set with any particular shipper in mind, or at such high minima that they could be used by only one or a few shippers at best. Id. (476–477).

With respect to the alleged unlawfulness of volume discount rates, the cases have usually required a showing that a carrier has given special preference to one particular shipper by setting a volume minimum so high that only that shipper can qualify for the reduced rate, or else the spread in the rates is so excessive and inhibitory toward movement of traffic that a great deal of justification is required. Id. (477).

With respect to volume discount rates, a party alleging violations of sections 14 Fourth or 16 First should first show an excessive rate spread and make some showing that the excessively high level applicable to smaller volume shipments has, in fact, inhibited movement of a commodity or prejudiced an identified shipper. If so, the carrier should then provide justification. In the present case, these prerequisites have not been made and no shipper testified or was identified as suffering prejudice. Id. (479).

In view of the case law, there is no reason to insist upon only one type of justification for a carrier's volume discount rates, to wit, cost savings, especially since the factors offered by the carrier in justification were not refuted. Because of the carrier's inherent disadvantages in competing with a great number of carriers many of which offer more complete containerized services, because of the need to attract cargo so as to reduce per call costs on a unit basis and to assist in establishing an eastbound container service, in the interest of encouraging the NVOCC, and because of administrative cost savings, albeit limited, the carrier offered sufficient justification. Furthermore, since the case involves questions of undue or unjust discrimination or prejudice, etc., precise fixing of rates by matching them with costs or other factors is not required especially in the total absence of testimony from shippers or consignees in the trade as to harm which they are supposedly suffering from such discrimination. Id. (481–482).

RATES: See also Agreements Under Section 15

Carrier operating between Pacific Coast and Hawaiian ports and American Samoa sustained its burden of proving that general rate increases (23% outbound and 12% inbound) were just and reasonable within the meaning of section 18(a) of the 1916 Act and sections 3 and

4 of the 1933 Act. While there might be some question as to the methodology used in allocating certain expenses or in determining cost differentials between the outbound and inbound legs, these questions do not affect the ultimate conclusion. As to issues concerning alteration of the rate profile or adjustment of the outbound—inbound percentages of increase, the record does not contain evidence sufficient to offset the fundamental conclusion that the carrier's financial needs justify the rate increases or to enable the presiding judge or the Commission to devise specific alternative rate changes which would satisfy what no party can dispute is the right of the carrier to operate without incurring losses. The carrier had suffered losses in the trade and, by anybody's calculation, the line will still suffer losses despite efforts to reduce itineraries and to employ its most efficient ship in the trade. Pacific Islands Transport Line—Proposed General Rate Increases, 215 (224–226).

With respect to the concern of Samoan interest, neither the limited evidence nor applicable principles of law enable the Commission to find that rate increases (23% outbound and 12% inbound) in the trade between the Pacific Coast and Hawaii and American Samoa, considering the overall loss position of the carrier and other evidence, should be adjusted in a particular fashion either as among individual commodities or by changing the outbound/inbound levels. While American Samoa is dependent on ocean shipping, the evidence did not gauge the extent of the alleged adverse impact on the economy of American Samoa. On the record, the carrier could not be found to have acted contrary to law in seeking additional revenue, despite possible adverse impact on the economy of American Samoa. In appropriate cases the Commission has found that some commodities may have to bear a higher rate than other basic subsistence commodities, out of concern for the economy of certain areas. In this case, however, exports to American Samoa consist essentially of foodstuffs. Even if the Samoan interests had identified which commodities are not essentials and should bear higher rates, there was a serious impediment as a matter of law to such tampering with the carrier's rate profile. Since the carrier had incurred continued losses and had the expectation of the same situation for at least the immediate future, the principle of adjusting rate profiles as between subsistence and luxury, non-essential items could not be applied by the Commission. Id. (227–229).

Suggestion of Samoan interests that a carrier's inbound rate increases (12% compared to 23% outbound) from American Samoa to the United States might be raised somewhat with a corresponding reduction of the outbound increases was too unspecific and lacking in support either in the record or under applicable principles of law. The

carrier's explanations of its outbound increase were not challenged or disputed on brief. Under applicable principles of law, a carrier may hold down increases on certain commodities providing that the resulting rates produce revenues sufficient to cover at least out-of-pocket costs so that no other rate payers are burdened with direct costs attributable to the lower-rate cargoes. The carrier's lower inbound rate increases were justified by costs and competition. Loss of revenue inbound could lead to further increases outbound. Id. (229–231).

Request for reparation, based on a complaint that unwarranted storage charges were assessed against complainant because of respondent's delay in sending an arrival notice, was denied. The vessel arrived in port on November 8, 1971, was discharged November 13, and the arrival notice was sent on November 18. Complainant contended that a January 5, 1972, letter was the first notice it received. However, the letter referred to "notification originally dispatched" and thus was corroberative of respondent's contention that notice was mailed on November 18. Therefore, there was no showing of unjustness or unreasonableness in any regulation or practice of the respondent which would be violative of section 17 of the 1916 Act. Nor was there any showing of a change in charges in violation of section 18(b)(2), since the bill of lading expressly provided for the assessment of additional costs where a deviation, as here occurred, from an anticipated route was required. William K. Mak v. Thor Eckert & Co., Inc., 258 (260–262).

Contention that a finding that New Jersey law prohibited the movement of a container loaded with 45,000 pounds of cargo over New Jersey highways of necessity leads to a conclusion that a tariff rule is unjust and unreasonable because only by loading 45,000 pounds in a 40 foot container can a shipper avoid having to pay for the 85 percent cubic minimum in the rule for measurement cargoes, was not persuasive. The New Jersey law does not necessarily or directly prohibit the moving of a container loaded with 45,000 pounds over New Jersey highways. New Jersey law speaks in terms of gross weight (22,400 pounds) which may be imposed on the highway by the wheels of any one axle of a vehicle. Further the law incorporates by reference certain federal laws. Under these laws it was permissible to have a tractor-trailer combination of gross weight of 73,280 pounds. Thus, if the combined weight of the tractor and trailer excluding cargo was 28,700 pounds or less, then 45,000 pounds or more of cargo could apparently be legally carried on New Jersey highways. Campbell Soup Co. v. United States Lines, Inc., 286 (288).

Carrier properly applied its 85 percent of cubic capacity rule to containers loaded by the shipper, and the tariff was just and reason-

able. There was no violation of section 18(a) of the 1916 Act. Id. (288, 295–296).

To permit a carrier's clerical error in assessing an erroneous rate to abrogate the strong commands of section 18(b)(3) of the 1916 Act against charges other than tariff charges, would flout the law. The carrier's compounded clerical errors in this case stand corrected, thus permitting application of the proper rates and charges. The previous errors cannot be used to impute an ambiguity to the filed tariff. Upjohn Co. v. Sea-Land Service, Inc., 301 (305).

Shipper's claim that it was entitled to a "special rate" on a shipment to Pusan, Korea, was not supported by the record. The tariff clearly indicated that the special rate only applied to the ports of Nagoya, Yakohama, Kobe and Osaka. A tariff rule provided that special rates apply only on the commodity and to the port for which the special rate is named. Brodhead Garrett Co. v. United States Lines, Inc., 347 (351).

While not passing on FAK rates generally, the Commission finds that the FAK rates of a carrier have not been shown to give any undue or unreasonable preference or advantage to any particular person in violation of section 16, First, establish any rate fare or charge which is unjustly discriminatory between shippers in violation of section 17, or establish a rate which is so unreasonably high or low as to be detrimental to the commerce of the United States in violation of section 18(b)(5). A showing that a high percentage of the carrier's carryings are in electronic goods and that the carrier did not carry a wide variety of items carried by a protesting carrier which are lower rated, was not sufficient for a conclusion that the FAK rates are, in fact, discriminatory against low value, low rated commodities and discriminatory in favor of high value, high rated commodities. There were many reasons why the lower rated commodities were not moving on the carrier. Agreement No. 9955–1–A/S Billabong; Westfal-Larsen and Co. A/S; Fred. Olsen & Co.; and Star Shipping A/S, 426 (429–430).

With regard to volume discounts the Commission agrees with an initial decision that a carrier's volume discount rates were not per se unreasonable and that there was no showing of a violation of sections 14 Fourth of 16 First of the 1916 Act. Id. (430).

Carrier's FAK rate system was not shown to be unlawful as discriminating against low-value, low-rated commodity shippers and attracting shippers of high-value, high-rated commodities. FAK rates are well known in ocean shipping and inland transportation and are not considered unlawful per se. FAK rates are based on cost of service and do not discriminate among commodities on value of service or

"what the traffic will bear" considerations. There was no evidence that the carrier's rates inhibited shippers from requesting different rates nor testimony of shippers or conference witnesses that in any particular instances the high FAK rates had actually precluded movement of a particular commodity. Id. (471–473, 475).

As to contentions that a carrier's rates are unreasonably low, the record indicates that even though the inbound transpacific leg of the carrier's service is considered by the carrier to be back haul, the carrier's rates more than meet fully distributed costs. Even if Commission decisions requiring only that rate levels meet "out-of-pocket" costs, or that on a back haul rates may fall below fully distributed costs for competitive reasons, are ignored, the record shows that the carrier's revenues on its eastbound leg have met fully distributed costs. Id. (482).

As to contentions that a carrier is discriminating against U.S. exporters by maintaining disparate rates in its outbound/inbound service and, in its more limited service pattern outbound, has virtually embargoed similar commodities in the outbound trade, there is no support in law or fact for the contentions. The outbound containerized rates are lower than the inbound FAK rates. Even in a case where the issue of disparity is central to the proceeding, and it has been shown that an outbound rate is higher than a corresponding inbound rate, this alone is not enough to establish a violation, but it must also be shown that the higher rate has, in fact, impeded movement. There was no substantial evidence of embargoing of cargo. Id. (483–484).

REBATES: See Devices To Defeat Applicable Rates

REPARATION

Carrier was permitted to refund a portion of freight charges collected on a shipment of jute bagging for cotton bale covering from Calcutta to San Francisco, where, prior to the shipment, the carrier had increased its rates generally by 12.5 percent which would have made the rates $35.25 per cubic bale meter, but, due to clerical error, a rate of $36.00 was published in the tariff. Refund of the difference between the applicable rate and the rate charged was allowed. Mafatlal, Ltd. v. Scindia Steam Navigation Co. Ltd., 41 (43–44).

Where a carrier quoted a lower rate on a commodity than its tariff rate, and then agreed to change its tariff rate to conform with the quoted rate, an application for authority to waive collection of a portion of the surcharge was denied. There was no "error in a tariff of a clerical or administrative nature" or "an error due to inadvertence in

failing to file a new tariff." What was involved was an erroneous quotation of a rate. Commodity Credit Corp. v. Delta Steamship Lines, Inc., 57 (58–59).

When an offer of settlement is made and accepted by the parties to a reparation proceeding, the Commission is nevertheless required to exercise its decisional responsibility by making findings and a judgment on the merits. The Commission is guided, generally, by the principle that settlements are to be encouraged, but this approach is only available within the boundaries of the underlying statutory scheme which, as provided in section 18(b)(3) of the 1916 Act, directs common carriers to collect the rates and charges specified in their tariffs and forbids rebates, remissions or refunds of lawful charges. It follows that an agreement to settle a proceeding brought under section 22, alleging a violation of section 18(b)(3), can be approved only upon an affirmative finding that such violation occurred. Consolidated International Corp. v. Concordia Line, 180 (182–183).

Cameras, photographic enlargers and their parts were under applicable precedent, entitled to be classified as "machines", and thus were subject to the carrier's "machine" rate rather than the higher "cargo" rate (there was no specific tariff classification for cameras). When two descriptions and tariffs are equally applicable, the shipper is entitled to have applied the one specifying the lower rates. Accordingly, a settlement between the parties, based on refund of the difference,—between the cargo rate charged and the machine rate, without interest, was approved. Id. (185–186).

Where complainant showed that a commodity shipped under a trade name, and rated as cargo, n. o. s. as a minimum under a tariff rule, was in fact silicon dioxide for which the carrier had a lower tariff rate, the complainant was entitled to reparation. The tariff rule referring to cargo, n. o. s. "as minimum" presented the opportunity for discrimination between shippers and as such could not be relied on. Should such a rule mandate the application of the cargo, n. o. s. rate as the only rate applicable, the Commission would be more favorable to sustaining reliance on that rate. [This holding is that of Chairman Bentley and Vice Chairman Day. Commissioner Hearn concurs in the award of reparation but disagrees with the rationale therefor and with the advice as to an acceptable rule. He would grant reparation solely on the basis of complainant's ability to meet its burden of proof. Commissioners Barrett and Morse dissent, contending that the tariff item in question establishes a rate rule which leaves no room for carrier qualification or discretion]. Ocean Freight Consultants v. Royal Netherlands Steamship Co., 187 (190–193).

A carrier may not rely on a tariff rule that "Bills of lading reflecting

only trade names will be automatically subject to application of the rate specified herein for cargo, N. O. S. as minimum". Since complainant sustained its burden of proof that the commodities actually transported were detergents and should have been assessed the tariff rates applicable to detergents, reparation was awarded. Johnson & Johnson International v. Prudential-Grace Lines, Inc., 244 (246–247).

As to the conflict between the two year statue of limitations provided in section 22 of the 1916 Act for a reparation complaint and a lesser period of time provided in a tariff, the Act prevails. AMF Inc. v. American President Lines,248 (252).

Where the shipper failed to prove that a carrier violated the provisions of the applicable tariff in transporting goods to Okinawa ("special rates" were applicable only to named "Japan ports" and Okinawa was not at the time a "Japan port"), the shipper was not entitled to reparation. There was no reason that would preclude the use of the specific tariff section and having it prevail over general arguments as to fairness. Id. (252).

Rate of interest of seven percent awarded by the Administrative Law Judge on the amount of reparation, if not paid within a certain time, is reduced to six percent, the rate traditionally awarded by the agency. McDonnell Douglas Corp. v. Hapag-Lloyd North Atlantic Service Steamship Co., 253.

A conference rule providing that claims for adjustment of freight charges must be presented within six months after shipment date cannot bar recovery in a complaint case brought under section 22 of the 1916 Act. Accordingly, since the complaint was filed within the two-year statute of limitations contained in section 22 and the alleged overcharges were admittedly substantiated, reparation was awarded. Id. (256).

Request for reparation, based on a complaint that unwarranted storage charges were assessed against complainant because of respondent's delay in sending an arrival notice, was denied. The vessel arrived in port on November 8, 1971, was discharged November 13, and the arrival notice was sent on November 18. Complainant contended that a January 5, 1972, letter was the first notice it received. However, the letter referred to "notification originally dispatched" and thus was corroberative of respondent's contention that notice was mailed on November 18. Therefore, there was no showing of unjustness or unreasonableness in any regulation or practice of the respondent which would be violative of section 17 of the 1916 Act. Nor was there any showing of a change in charges in violation of section 18(b)(2), since the bill of lading expressly provided for the assessment of additional costs where a deviation, as here occurred, from an anticipated route

was required. William K. Mak v. Thor Eckert & Co., Inc., 258 (260–262).

Carrier was justified in applying its general cargo rate, rather than the lower rate applicable to "sets, Parenteral Administration, Empty," to shipments described as "Intravenous Solution Sets." Conceding that, in general, a parenteral administration set is the same device as an intravenous solution set, it could not be concluded that the sets had been proven to have been empty. Variations in weight, measurement, and other packing characteristics raised serious questions as to the actual contents of the shipments. Deviations of the sort here shown on the various bills of lading raised serious doubts that the items shipped were all identical, i.e., empty parenteral administration sets. Complainant failed to meet its heavy burden of proof. Abbott Laboratories v. United States Lines, Inc., 262 (264–265).

The *Kraft* "rule," which is that in cases of disputed weights or measurements brought to the attention of the carrier after the cargo had left its possession, the carrier was justified in refusing to honor a reparation claim, provided its effective tariff contained a rule so stating, does not extent to cases involving descriptions of goods. Economics Laboratory, Inc. v. Prudential-Grace Lines, 269 (272).

In cases such as the present one where the issue was whether the chemical product shipped consisted of "Detergent Alkylate" so as to qualify for the specific commodity rate published in respondent's tariff under that designation, the determining factor is what complainant can prove based on all the evidence as to what was actually shipped. Where the shipment has left the custody of the carrier, however, and the carrier is thereby prevented from personally verifying the complainant's contention, the complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. Id. (279–280).

Carrier, in defending a reparation claim, will not be permitted to rely on a tariff rule that all claims (other than those based on alleged errors, in weight or measurement) for adjustment of freight charges must be presented to the carrier within six months after date of shipment. The present case involved an inadequate description of goods and a carrier may not rely on its six-month time limit rule for such claims. Abbott Laboratories v. United States Lines, Inc., 262 (265).

Reparation was denied where the shipment in question had left the custody of the carrier and the shipper failed to prove with reasonable certainty and definiteness that the shipment described on the bill of lading as "Industrial Chemical Products" was in fact a particular type of detergent known as "detergent alkylate" which would have been entitled to a lower rate than what was actually assessed. Id. (281–282).

Reparation was awarded where the carrier assessed noncontract rates on a shipment on a bill of lading dated after the date when the shipper signed a dual rate contract. The claim had been denied because it was not submitted within six months of the date of shipment as required by a tariff item. A claim filed within two years from the date the cause of action arose must be considered on its merits. Scheer Enterprises Co., Inc. v. Venezuela Line, 283 (284–285).

Where a shipper's claim rests solely on alleged bill of lading errors, the shipper necessarily has a heavy burden of proof since the shipment has left the custody of the carrier. Campbell Soup Co. v. United States Lines, Inc., 286 (287).

Refund or waiver of the collection of a portion of freight charges is permitted where "there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff." Application to refund a portion of freight charges must be denied where, on complainant's inquiry, the conference informed it of a special project rate for another named shipper; complainant requested that the rate be amended to include the name of complainant; complainant failed to request prompt conference action; the conference took up the request at its next regular meeting at which time the project rate was amended by deleting reference to a specific shipper; and, before the amendment was filed, the shipment had moved, The inapplicability of the special project rate was not due to administrative error or inadvertence. It was due to the failure of the parties to act promptly to amend the tariff. Dieterle & Victory Int'l Transport Co., Inc. v. American President Lines, 297 (300).

Where a claim is made against a carrier for reparation, and the carrier confesses that the rates and charges were incorrect due to the carrier's clerical errors resulting not in an overcharge but an undercharge, the clerical errors did not give rise to creation of an ambiguity in a filed tariff and reparation should be denied. The carrier must proceed forthwith to collect the undercharge, resorting, if necessary, to the appropriate legal forum. Upjohn Co. v. Sea-Land Service, Inc., 301 (304).

A carrier was justified in refusing a shipper's claim on the basis of a tariff rule that adjustment of freight based on alleged error in weight, measurement, or description may be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession. The carrier had apparently consistently denied such claims on the basis of the rule. Even if it were not so justified, complainant failed in the present case to sufficiently shoulder its heavy burden of proof to permit it to recover the alleged overcharges. P.P.G.

Industries, Inc. v. Royal Netherlands Steamship Co., 331 (332–334, 337).

Reparation was awarded where the shipper met its heavy burden of proof as to the identity of the commodity which actually moved. It was abundantly clear that the shipper shipped and the carrier's agent understood to have been shipped "Sodium Acid Pyrophosphate" (the bill of lading and the export declaration described the cargo as "Sodium Pyrophosphate"). The commodity was correctly rated as "Sodium; viz: Acid Pyrophosphate", but the carrier had incorrectly applied a standard rate rather than a reduced rate temporarily existing side by side with the standard rate. Stauffer Chemical Co. v. Royal Netherlands Steamship Co., 338 (339–340).

Reparation was awarded under circumstances where the commodity shipped was described on the shipping document as "polishes," the shipper submitted the commercial invoice which described the cargo as "rubbing compound" for which the carrier had a rate, and the carrier did not contest the accuracy of the claim that the cargo was in fact, rubbing compound. Failure of the carrier to charge the rate applicable to "rubbing compounds," rather than that applicable to "polishes," although induced by the misdescription of the cargo in the shipping documents, constituted a violation of section 18(b)(3) of the 1916 Act. P.P.G. Industries, Inc. v. Royal Netherlands Steamship Co., 341 (342, 345–346).

Carrier tariff rule that "claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment" does not bar consideration on the merits of a reparation complaint filed within two years from the date the cause of action arose. Id. (345).

Carrier's rating of cargo described on the bill of lading as "one Box Electric Demo. Training Unit" and on the invoice as "One Box Electronic Demo. Training Parts Unit, Laboratory Apparatus and Equipment," under the tariff item for "Cargo, not otherwise specified," rather than under the item for "Machinery and Parts, N.O.S.," was proper and reparation was denied. There was no tariff listing under "electronic" "demo" "units" "training" "laboratory" "apparatus" or "equipment". On the other hand, there was nothing to indicate that the commodity would fall within the description of these included in the item for "Machinery and Parts, N.O.S.". Brodhead Garrett Co. v. United States Lines, Inc., 347 (351–352).

Tariff rule that "claims for adjustment of freight charges, if based on alleged errors in weight or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier" was not applicable where the bill of

lading showed that four pallets of mayonnaise measured 193 cubic feet and weighed 7678 pounds and the disputed fact was simply whether that measure/weight combination equals "net over 60 cu. ft. per 2240 lbs." or "over 60 cu. ft. per 2240 lbs." A simple mathematical computation was all that was required to resolve that issue. There was, in essence, no claim for adjustment of charges based on alleged errors in weight or measurement. Reparation was, accordingly, awarded. Kraft Foods v. Atlantic Container Line, Inc., 353 (355).

Where the bill of lading described the cargo shipped as "preserves," the shipper was not entitled to reparation on the gound that the shipments should have been rated under the tariff item for "Preserves, Fruit, Packed: Jams, Jellies, Marmalade," rather than under the tariff item (higher rate) for "foodstuffs, N.O.S. packed." Complainant did not attempt to corroborate its claim based on the bill of lading description and, thus, had done nothing more than make a simple assertion of its position. This did not reach the standard required of complainants in such cases to have such a claim sustained. Id. (355–356).

Where the bill of lading described the commodity shipped as "mustard," the carrier should have applied the tariff item for "foodstuffs, N.O.S.," rather than the item for "Spices, N.O.S.," and the shipper was entitled to reparation. From the commonly accepted definition of mustard and spices, coupled with that of condiment, it was reasonable to conclude that mustard, depending upon its final commercial form and use, could be a spice and then again might not be. Where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate. Here, both classifications could well cover the commodity. Id. (356, 361).

Reparation was properly denied where the shipper alleged that the cargo had an inside measurement of 914 cubic feet while the shipping documents showed only a 1700 cubic foot (minimum) description, thus leaving the carrier in an utterly defenseless position. There would seem to be no way for a carrier in such circumstances to rebut the allegations of a shipper. The carrier's denial of the claim was proper on the basis of a tariff rule which prohibited consideration of claims for overcharges based on alleged errors in weights or measurements unless the claim was submitted to the carrier before the cargo left its possession. P.P.G. Industries, Inc. v. United States Lines, Inc., 362 (363, 365).

Shipper was entitled to an award of reparation where it substantiated its bill of lading description by means of export declarations containing descriptive Schedule B commodity numbers. This substan-

tiation was sufficient to meet the heavy burden of proof which must be borne by complainant. The claim had been denied on the basis of a tariff rule precluding consideration of such claims unless filed within six months of date of shipment. The Commission has repeatedly disallowed the defense. Kraft Foods v. Atlantic Container Line, 366 (367, 369–370).

Decision of the settlement officer, awarding reparation, rested solely on the ground that the carrier's time-limit tariff rule could not be used to preclude relief: Implicit in this conclusion is the determination that complainant has also met its burden of proof. However, an affirmative finding that complainant has sustained its case should be made explicit. The Commission is convinced that complainant adequately met its burden of proof, that respondent's proffered defense is unsatisfactory, and that therefore reparation should be granted. Ocean Freight Consultants, Inc. v. Atlantic Container Line, Ltd., 371 (372–373).

In cases involving a misdescription of goods, a tariff rule that claims for adjustment of freight charges will be considered only if submitted within six months of date of shipment, and that adjustment based on alleged error in description may be declined unless the application is submitted sufficiently in advance to permit verification of description before the cargo leaves the carrier's possession, may not be used to shelter a carrier from its obligations to pay a legitimate overcharge claim which is timely filed with the Commission. Moreover, the discretionary nature of the tariff provision renders it unenforceable. Abbott Laboratories v. Alcoa Steamship Co., 376 (378).

The Commission cannot disagree with the showing of the shipper that the products shipped were something other than "raw drugs," nor can it dispute the showing that there are lesser rates more appropriately applicable to the various commodities shipped. The willy-nilly description of such items as corn oil and detergents as "raw drugs" on a bill of lading is inexcusable. If the Commission had equitable powers in such cases, it would be disposed to deny the claim. Being unable so to judge the case, reparation is awarded. Id. (379).

Carrier properly rated a commodity described in the bill of lading as "Lactabumin Powder 100" as cargo, N.O.S., rather than "Powdered Milk, N.O.S.". The determining factor was what complainant could prove based on all the evidence as to what was actually shipped. Where, as here, the shipment had left the custody of the carrier, and the carrier was thereby prevented from personally verifying the complainant's contentions, complainant had a heavy burden of proof and had to set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. This the carrier failed to do.

Nothing in the record was persuasive that Lactabumin and Powdered Milk are synonymous. Merck Sharp & Dohme (I.A.) Corp. v. Flota Mercante Grancolombiana, S.A., 384 (387–388).

If there is a lawful tariff rule applicable to reparation claims based on asserted errors in weight, measurement, or description, the Commission gives effect to the rule. Here, there is no claimed error in weight, measurement, or description. Rather, this is a simple factual question of whether the commodity shipped and described as Lactabumin is "a form of powdered milk." The commodity did not fit within the tariff item, "milk, Powdered, Plain or Skim, N.O.S. (not milk compounds)." Id. (388–389).

SURCHARGES

Insofar as a complaint alleged that a surcharge violated section 18(b)(5) of the 1916 Act as being so unreasonably high as to be detrimental to the commerce of the United States, the complaint was dismissed. The challenged surcharge was at the time of hearing and now no longer in effect and any determination of validity under section 18(b)(5) would be academic. Commodity Credit Corp. v. Lykes Bros. Steamship Co., Inc., 49 (51).

Where an issue as to the validity under section 18(b)(5) of the 1916 Act of surcharges had become moot beceause the challenged surcharges were no longer in effect, a contention that some level of surcharge still exists, albeit not necessarily the same level as before, would not resurrect the issue. Complainants would invalidate any war risk surcharge which did not exactly match the costs of the premiums for the war risk insurance. Obviously, a new set of facts would be necessary before any decision could be made as to the cost theory as it applied to current surcharges, if any, and whatever their level might be. Id. (52–53).

A war risk surcharge imposed on shipments to Lebanese ports did not violate the proscription of section 16 of the 1916 Act against undue prejudice or preference because no war risk surcharge was imposed on shipments from Beirut to the United States or from Canada, the Great Lakes and the U.S. West Coast to Beirut. The shipment in question did not move in competition for markets with any other shipments from any other areas. Thus, the seemingly essential competitive relationship was missing. While the Commission has often found violations of section 16 without a competitive relationship, another essential ingredient for finding unlawful preference or prejudice was missing, i.e., the alleged preference and prejudice did not stem from a common source. Respondents were not members of the

Great Lakes or Pacific Coast conferences in question, and thus they could not be the common source of such alleged preference or prejudice. As for shipments from Beirut to U.S. ports, port congestion at Beirut was a large factor in the surcharge at Beirut. A vessel would call at Beirut and be given a "number", then it would call at other Mediterranean ports and return at its newly appointed time for surcharge. No comparable situation existed on the inbound leg of the voyage. Transportation factors were present here, and because they were complainant must show something more than the absence of a surcharge from Beirut—it must show a competitive relationship from which the failure to impose the surcharge has harmed them. Id. (53–55).

Imposition of a war risk surcharge on shipment from certain U.S. ports to Beirut, Lebanon, was not violative of section 16 of the 1916 Act because no such surcharge was imposed on cargoes shipped from U.S. Gulf ports to Israeli ports. There was a surcharge to Israeli ports denominated simply as "Israeli surcharge". Apparently, complainant's point was that the surcharge was primarily for port congestion and therefore could not have been a "war risk" surcharge. However, one of the products of the "hostilities" was port congestion. The validity of the surcharge could not depend on its appellation. Moreover, by simple denominating it as a surcharge without any qualifier, the surcharge could be "war risk", as well as "congestion", neither, or both. Transportation factors were present in the case and complainant failed to show the requisite relationship to establish a section 16 violation. Id. (55–56).

TARIFFS

Cameras, photographic enlargers and their parts were under applicable precedent, entitled to be classified as "machines", and thus were subject to the carrier's "machine" rate rather than the higher "cargo" rate (there was no specific tariff classification for cameras). Where two descriptions and tariffs are equally applicable, the shipper is entitled to have applied the one specifying the lower rates. Accordingly, a settlement between the parties, based on refund of the difference,—between the cargo rate charged and the machine rate, without interest, was approved. Consolidated International Corp. v. Concordia Line, 180 (185–186).

Where the shipper failed to prove that a carrier violated the provisions of the applicable tariff in transporting goods to Okinawa ("special rates" were applicable only to named "Japan ports" and Okinawa was not at the time a "Japan port"), the shipper was not entitled to repara-

tion. There was no reason that would preclude the use of the specific tariff section and having it prevail over general arguments as to fairness. AMF Inc. v. American President Lines, 248 (252).

A carrier's tariff was not ambiguous because it contained a standard rate for a particular commodity and a temporary reduced rate for the same commodity. There is nothing uncommon in having a reduced rate for a commodity existing side by side with the standard rate. Stauffer Chemical Co. v. Royal Netherlands Steamship Co., 338 (340).

Where the bill of lading described the commodity shipped as "mustard," the carrier should have applied the tariff item for "foodstuffs, N.O.S.," rather than the item for "Spices, N.O.S.," and the shipper was entitled to reparation. From the commonly accepted definition of mustard and spices, coupled with that of condiment, it was reasonable to conclude that mustard, depending upon its final commercial form and use, could be a spice and then again might not be. Where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate. Here, both classifications could well cover the commodity. Kraft Foods v. Atlantic Container Line, Inc., 353 (356, 361).

Contention that a tariff requires that cargo inadequately described on the bill of lading be assessed the highest tariff rates is rejected. What actually moves as shown by all the evidence determines the applicable rate. Abbott Laboratories v. Alcoa Steamship Co., 37y (378).

TERMINAL LEASES

Lessee and sublessor of container berths at the Port of Philadelphia was an "other person" subject to the 1916 Act by virtue of its retention of control over the use of the facilities subject to the leases in question. Inasmuch as the lessees are undisputedly "other persons" subject to the Act, the agreements fall within the Commission's jurisdiction. The Commission must examine not only the terms of an agreement but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objective and results of the agreement. The leases must be filed for approval. Agreement Nos. T-2455/T-2553, 115 (128, 134).

Terminal lease agreements relating to container handling facilities at the Port of Philadelphia clearly fell within one of the seven section 15 conditions. Further, when viewed together in light of the fact that they provide for lease of the only two truly modern container handling facilities in the port, they clearly fell within the specific condition of section 15 which requires the filing of agreements "controlling, regulating, preventing, or destroying competition." Id. (134).

Terminal lease agreements relating to container handling facilities at the Port of Philadelphia were implemented prior to Commission approval in violation of section 15 of the 1916 Act. Contention that the leases had not been implemented because the only provisions of the leases which made them subject to section 15 were the "use" clauses which had not been implemented, was rejected. Once it is determined that a particular part of an agreement requires that the agreement be filed, the statute is clear that the entire agreement must be filed. Before approval, no part of the agreement may be implemented. Here, the terminals had been operated pursuant to leases since 1971, and the parties had been in violation of the Act since then. Id. (129, 134–135).

Implementation of terminal leases involving virtually all of the modern container handling facilities in the Port of Philadelphia created a monopoly. Those facilities which are capable of handling containers in quantities less than carried by full container ships are not viable competitors of the lessees. The promise of future full container handling terminals does not offer an alternative competitive situation. It is also uncertain that there is currently sufficient containerized traffic at the Port to warrant another container terminal. The Commission concludes that the present operation of the container handling terminals by lessees (under common control) is so anticompetitive as to be detrimental to the commerce of the United States in violation of section 15 of the 1916 Act. Id. (135–136).

The intra-port anticompetitive aspects of the operation of virtually all of the modern container handling facilities at the Port of Philadelphia by commonly controlled lessees of the facilities warrant disapproval of one of the two leases, such disapproval being based on the undue or unreasonable preference or privilege to the lessee to the detriment of other competing terminal operators/stevedores in violation of section 16 First of the 1916 Act. The lease must be disapproved in that approval in concert with the other lease would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act. The other lease is approved, for by approving, the lessee will not be deprived of all container operations at the Port, but rather will be allowed to retain its lease on the most utilized modern container facility. Id. (136).

Lease agreement for one of the two modern container handling facilities at the Port of Philadelphia is disapproved conditionally. The Port must solicit bids for operation of the entire complex, both breakbulk and container, with separate bids for the breakbulk and container facilities. The Port, in its discretion, may select a new tenant to operate the entire complex, or it may continue its present

lease with the lessee (who is also lessee of the container facilities) for the breakbulk berths and select the most advantageous proposal for operation of the container berths, excluding the present lessee or its subsidiaries or affiliates. No bid has to be accepted, the rental terms of which are less in amount than those found in the disapproved lease. If no bid acceptable to the Port and the Commission is received from a new tenant, the present agreement may be resubmitted for approval. Id. (136–137).

Charges and conditions imposed by the lessee of grain elevator facilities on stevedores using the facilities did not constitute a modification of the approved lease agreement between the terminal operator and the Port. The lease did not restrict the lessees' authority to establish and maintain rates for the handling and storage of grain, save only that the lessee could not assess dockage charges and rates for storage and handling of grain had to be competitive and comparable with rates at competitive ports. The record showed that the rates were competitive. There were no conditions, restrictions, or qualifications contained in the order approving the lease. The Commission may not lawfully modify, reduce, or restrict the approval previously given without initiating and following the notice and hearing procedures established by section 15 of the 1916 Act and section 9 of the Administrative Procedure Act. Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 140 (158–160).

With respect to the issue of damages as a result of the imposition of new charges and conditions imposed on all stevedores by the lessee of grain elevator facilities at a port, there was no evidence of actual damages to the complaining stevedoring entity. The relationship between the lessee and its wholly owned subsidiary stevedore did not in and of itself render unlawful the imposition of the charges and conditions. A situation existed which could give rise to discriminatory practices but no unlawful situation in fact existed. So long as the relationship remains at arm's length, the subsidiary pays the same charges as other stevedores and no competitive advantage is given the subsidiary over other stevedores using the lessee's facilities, no unreasonable preference on privilege exists that would be violative of section 16 First of the 1916 Act. Id. (160).

With respect to the allocation by the lessee of grain elevator facilities of the cost of the shipping gallery, the allocation of a full fifty percent of the cost to the stevedores is an unreasonable practice within the meaning of section 17 of the 1916 Act. Past applications of the Freas Formula to grain elevator operations have normally assessed one-half of the costs of the shipping gallery to the cargo (as in the present case) and one-half to the vessel. Allocation of costs must be

based on benefits received, and as between stevedores and vessels, stevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel. A portion only of the fifty percent in issue is allocable to the stevedore. Id. (162).

With respect to the allocation by the lessee of grain elevator facilities of the total costs of the grain deck and wharf to the stevedores, the charge, inasmuch as it relates to the use of the barge unloading facility, the pile clusters, the dust collection system, and the spouts to the extent assessable against cargo or vessel, is an unreasonable practice under section 17 of the 1916 Act. Stevedores benefit from the privileges of ingress and egress from the vessel and to some degree from the use of the spouts, but in no way can the total cost for the use of the dock be attributed to stevedores. Both cargo and vessel benefit. Id. (163).

Charges imposed by the lessee of grain elevator facilities on stevedores for costs associated with dock clean-up and liaison service are unreasonable practices under section 17 of the 1916 Act. The costs were not justified on the record. The decks were cleaned only sporadically and the $25,000 per year for liaison services was unsubstantiated. Thus, those portions of the overall costs were not shown to be reasonably related to the benefits derived therefrom by the stevedores. Id. (163).

With regard to charges imposed by the lessee of grain elevator facilities on stevedores for utilities and overhead expenses, the allocation to stevedores of $933.00 per year for water, toilets, telephones and utilities does not appear to be so unreasonable as to justify disapproval. Nor does the amount of overhead expenses allocated to the stevedores appear to be reasonable. Id. (163).

The imposition by the lessee of grain elevator facilities on stevedores of an indemnity requirement of $100 per hour for delays caused by failure to provide sufficient numbers of longshoremen is an unreasonable practice under section 17 of the 1916 Act. The requirement is onesided with no compensation awarded stevedores for delays caused by the lessee. Likewise, the requirements for "utmost care" in stevedoring operation, for evidence of adequate liability insurance coverage insofar as the insurance companies must be acceptable to the lessee, and for posting deposits to secure payment of the services and facilities charge and the delay indemnity charges are similarly onesided and thus unreasonable practices under section 17. With regard to the insurance requirement, it would appear to be sufficient to accept insurance coverage from any company licensed to do business in the state. Id. (164).

Failure of the lessee of grain elevator facilities to comply with the requirement of General Order 15 that terminal operators must file a schedule or tariff showing all rates, charges, etc., connected with the receiving and handling of goods was an unreasonable practice in violation of section 17 of the 1916 Act. Id. (164).

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